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APPENDIX.

~~**VOLUME II.**~~

IN THE

Supreme Court of the United States

October Term, 1970

~~No. 1562~~ 70-117

CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petition for Certiorari Filed April 8, 1971

Certiorari Granted May 17, 1971

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Petition for Certiorari Filed April 8, 1971
Certiorari Granted May 17, 1971

In the United States District Court, Central District of California.

Honorable E. Avery Crary, Judge Presiding.

In the Matter of Michael Gorean Stewart and Charles Joseph Kastigar. No. 2649—Misc. and No. 2650—Misc.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California.

Date: Thursday, February 4, 1971, Thursday, February 11, 1971.

Virginia K. Wright, Official Reporter, 402 U.S. Courthouse, 312 North Spring Street, Los Angeles, California 90012. Telephone: 622-4041. [1]

APPEARANCES:

For the Plaintiff: Robert L. Meyer, United States Attorney. By: David R. Nissen, Assistant United States Attorney, 1265 U.S. Courthouse, 312 North Spring Street, Los Angeles, California 90012.

For Michael Gorean Stewart: Margolis, McTernan, Smith, Scope & Herring, By: Oliver Wendell Holmes, Jr., 3325 Wilshire Boulevard, Suite 901, Los Angeles, California 90005.

For Charles Joseph Kastigar: Hugh R. Manes, 3440 Wilshire Boulevard, Suite 608, Los Angeles, California 90005. [2]

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LOS ANGELES, CALIFORNIA, THURSDAY, FEBRUARY 4, 1971, 10:30 A.M.

THE CLERK: This is the matter in the matter of the Cool Grand Jury, your Honor. The roll has been called and indeed there are twenty members of the Grand Jury present, which constitutes a quorum.

MR. NISSEN: Good morning, your Honor. David Nissen for the United States, representing the Grand Jury this morning. And there has been a partial report presented by the Government. We move at this time the report and the indictments therein be received and filed, and that the defendants be admitted to release on their personal recognizance as requested.

THE COURT: Very well. The report is ordered filed together with the indictments. The defendants are to be placed on their personal recognizance, as indicated by the Grand Jury report.

When do you want the Grand Jury to return, Mr. Nissen?

MR. NISSEN: Your Honor, they are going back upstairs when this proceeding is over and continue the work of the day, but they have nothing to do until the next matter is completed, so if it is permissible with the court may they sit here while we take up the next matter or not? It is up to you. [4]

THE COURT: I have no objection, but I am afraid we are going to argue about things concerning witnesses and so forth, and I think maybe it is better they not be here.

MR. NISSEN: Fine. Would your Honor ask them then to return to the Grand Jury room from where they came?

THE COURT: All right. Would you be good enough, ladies and gentlemen, to go to the Grand Jury room from which you came this morning on the upper floors of this building.

(Whereupon, the Grand Jury retired from the courtroom, and the following proceedings were had in the absence of the Grand Jury:)

THE COURT: The matters of Charles Joseph Kastigar and Michael Gorean Stewart.

Counsel, will you please announce your appearance.

MR. MANES: Hugh Manes appearing for Mr. Charles Kastigar.

MR. HOLMES: Oliver Holmes for Michael Stewart, your Honor.

MR. NISSEN: David Nissen for the Government.

THE COURT: These are applications for immunity —[5]

MR. NISSEN: Yes, sir.

THE COURT: —filed by the United States Attorney. I understand there is opposition, is there?

MR. MANES: That is correct.

MR. HOLMES: That is correct.

THE COURT: All right. I will hear your arguments. There have been authorities submitted to me this morning just about two minutes ago. I haven't read that New York case. I am familiar with the Piccirillo and the cases cited in Piccirillo. One of you relies on one of those cases and the Government relies on Murphy and you rely on Counselman. I will be glad to hear your argument.

MR. MANES: Your Honor, may the record show that while I had some possible suspicion that immunity

might be inferred this morning or attempted, we did not know until we arrived this morning that it was, in fact, going to be attempted, so that I was unable to come prepared, and also because I am in trial, with a written memorandum of points and authorites.

I would ask leave of the court to furnish such written memorandum and I will be glad to do so, your Honor, because I think that what is involved here is rather substantial questions which Piccirillo we hoped would answer but, as your Honor knows, from having read that decision. [6] did not reach.

I would respectfully invite your Honor's attention to the dissenting opinion of Mr. Grant, not because a dissent prevails, but rather because it underscores the position of the respondent in this case.

With all due respect to the Government it appears, however, that their memorandum and particularly the last page of their memorandum does not correctly represent the holding of the two cases relied upon.

The fact is that Counselman v. Hitchcock, 142 U.S. 547 is and has been for the last 70 or more years the law of the land in sanctifying the right of a witness to invoke the self-incrimination clause of the Fifth Amendment, unless the immunity is coextensive with that Fifth Amendment privilege.

We respectfully submit, your Honor, that Section 6002 and 6003 do not meet the requirement of the test of Counselman v. Hitchcock. It does not meet that test and we have to assume, because most, if not all of the lawyers on the judiciary committees of the respective branches of Congress are familiar with Counselman. They are familiar with points that were raised in subsequent cases and must certainly have in-

tended to limit the scope of the immunity that is granted there.

To underscore that we cite Ullman v. United [7] States, 350 U.S. 422 where the court agreed with the Government, that immunity there against prosecution in any proceeding in any court conferred an immunity coextensive of the Fifth Amendment privilege.

Nevertheless, after Ullman was decided and, indeed, after Murphy v. Waterfront Commission was decided, the Supreme Court handed down another decision in Albertson v. SACB, a Securities Activities Control Board case.

THE COURT: 382 U.S.?

MR. MANES: I believe so, your Honor. In which again they held that the truncated immunity conferred upon the witnesses there under a statute quite similar to the one at bar is not sufficient and it was not coextensive with the Fifth Amendment, and therefore it cannot be—

THE COURT: What statute was that? A State statute?

MR. MANES: That was a federal statute, if I recall correctly, your Honor.

THE COURT: What statute are you talking about? What statute were they interpreting in that case?

MR. MANES: They were interpreting a federal statute which purported to grant immunity to witnesses testifying before the SACB.

THE COURT: You mean that is the old statute. [8] the one we have always used? Is that what you mean?

MR. MANES: It is an older statute. I don't know that it has been repealed yet, but my point is not whether it is an old or new statute but that the lan-

guage of the immunity that was before the court is quite substantially the same as it was here.

THE COURT: My understanding is that this quite limits the immunity, the new statute, it is not the same as the statute that was in effect before.

Is that right, Mr. Nissen?

MR. NISSEN: Yes, sir.

THE COURT: This statute limits the immunity to the use of the testimony, in effect, as distinguished from the transactional phase—

MR. MANES: As distinguished from forbidding prosecution of the witness who has testified.

What is the effect of that, your Honor? The effect is that—

THE COURT: I understand your argument. But all I am asking you now is, when you say the 382 decision interpreted a statute very similar to the one before us now, that is what I question, because I would like to know what statute that is.

This statute limits the immunity, the new statute, and the old statute didn't limit the immunity as it [9] does now.

MR. MANES: It doesn't. The old statute limited immunity that was before the SACB.

What I am saying, your Honor, was that the statute before the SACB was substantially the same type of statute as the one before your Honor.

THE COURT: Maybe so.

MR. MANES: It was a use statute rather than a transactional statute. That is, it did not forbid prosecution. It only forbid use.

THE COURT: All right.

MR. MANES: And what I am saying is that the court struck that down, and that was a year after Murphy was decided. There has been nothing in the history of court decisions since that time or, indeed, since Counselman v. Hitchcock that is in any way mitigated—the language of Counselman v. Hitchcock—in stating that any immunity less than that which infers immunity against prosecution is not sufficient.

I would add to that one further point, your Honor. One of the arguments that Judge Maffie makes, which is obvious from the nature of the problem, is that if a witness who testifies before the Grand Jury, under this court of immunity statute, is subsequently prosecuted for the offense about which he or she has been questioned, he has the [10] burden of showing that that prosecution and the evidence introduced against him was tainted in some way by leads furnished from his testimony.

How does an individual defendant go about proving that the Government is relying upon evidence that is tainted, particularly where Grand Jury transcripts are not available to him, particularly where he is barred from relying on later transaction that may have occurred in a Grand Jury secret proceeding, and for other reasons that I think must be apparent to the court.

So I am saying, your Honor, the Government's attempted offer of immunity will not help Mr. Kastigar. He must invoke the Fifth Amendment because there is no immunity either offered or authorized which can prevent him from being prosecuted for the offense which is the subject of this proceeding.

I have some other objections, too, your Honor. Under this immunity statute the law seems to say that when the Government has or seeks an order of immunity that a court has a duty, it says it shall issue the order.

Now, I cannot believe that the Congress has created a court to serve merely as a conduit for the actions of the Attorney General or the United States Attorney. Nor could I believe that would be a constitutional invasion of the [11] judicial branch of the Government.

As a matter of fact, it is to be noted that Judge Motley in her decision dealt there—her conclusion was that the order could not be issued and she refused to issue the order, notwithstanding the language at bar.

But what even is more significant or at least as significant to me is the fact that just as the Government may seek search warrants from this court from time to time, or from any court, and must be compelled to show reasonable cause for the issuance of a search warrant, in order for an invasion of privacy to be countenanced, and just as the Fourth and Fifth Amendments are intertwined, as held in Boyd v. United States, and reaffirmed in many decisions of the United States Supreme Court.

So I would believe it would be the duty of this court to demand from the Government some information, other than a mere conclusion, that the reasons for seeking testimony from a witness such as Mr. Kastigar is justified even under the law, assuming it to be otherwise valid.

Now, I know from the copy which the Government furnished me of its proposed order and its alleged

affidavits showing some reason therefor, that the reasons offered under the affidavit signed by Mr. Meyer that in—he says, "In my judgment the testimony of Charles Kastigar [12] sought is necessary to the public interest and material to the investigation now being conducted by the Grand Jury." That the Grand Jury is presently inquiring into alleged violations of laws of the United States, without specifying what law, what the scope of the inquiry is. There hasn't been any notice given either to me or to the witness, Mr. Kastigar, as to the scope of inquiry, the nature of the inquiry, the purpose of the inquiry.

He has no way of knowing what questions he must respond to as being material and what ones he would be privileged not to respond to, and so forth.

And finally the Government, Mr. Meyer, says, "On September 9 Mr. Kastigar appeared before the Grand Jury and invoked the constitutional privilege against self-incrimination and refused to answer." But I have—I obviously was not present at that time. I concede I was his counsel at that time but I was not present, of course. In fact, I was engaged in trial at the time.

I would respectfully submit I have no knowledge as to the precise questions that were asked of Mr. Kastigar. I was not furnished nor am I, according to Mr. Nissen, to be furnished with a list of—

THE COURT: Didn't he tell you what the questions were?

MR. MANES: Mr. Nissen has not. [13]

THE COURT: No. Your client.

MR. MANES: He did at the time, your Honor, he wrote down his recollection of some of the questions. But that was in September and we are now in February

and I did not retain them because he was excused. I did not realize that we were going to be confronted with this again.

I assume that Mr. Kastigar would be, since the immunity statute was not in effect at that time—not this one—and since there was no immunity statute in effect at that time applicable to Selective Service matters, at least, I would assume they were going to ask him those questions again.

THE COURT: There is no question in your mind, he is going to demand and request immunity.

MR. MANES: He is going to demand—excuse me. You mean that the Government is going to demand it?

THE COURT: Your client is going to demand immunity.

MR. MANES: He is going to demand immunity from prosecution, which the Government cannot furnish him.

THE COURT: Yes, he is going to demand immunity.

MR. MANES: From prosecution.

THE COURT: I know that is what you are demanding, and the Government is willing to give him immunity under the new statute. So that is where we are at loggerheads. [14]

But what they ask him really isn't too material now, is it, because he is going to demand immunity regardless of what they ask him.

MR. MANES: Well, I am trying to point out, however, your Honor, that the affidavit is defective for a number of different reasons, in that essentially it does not show reasonable cause. It does not produce facts.

THE COURT: What does the statute say as to what the affidavit is to show?

MR. MANES: Well, the affidavit—the statute appears to suggest that this must be the showing made, that the Government or that the Attorney General has given permission to the United States Attorney, who seeks the order, that the United States Attorney must in his judgment—or may proceed if in his judgment—

THE COURT: That is what I—

MR. MANES: But I think there has to be some due process under the Fifth Amendment to avoid unnecessary invasions of privacy of an individual.

How do you do that but to allow the court even in camera to pass upon whether this is a relevant matter, whether there is reasonable cause to defer the immunity or, indeed, even to question Mr. Kastigar.

There are no facts here, just conclusions by the United States Attorney as to this matter. And that [15] is what I am attacking here, is the affidavit as lacking those essentials which are requisite in all Fourth Amendment cases. And I am attacking it on the basis that the court has time and again required, before an authorized invasion can be constitutionally protected, there has to be reasonable cause shown.

Finally, I want to ask the court at this time when the Grand Jury, the present one, the one that is now in existence, when that came to being. May I inquire of the court on that?

THE COURT: The clerk will have to tell you.

THE CLERK: Your Honor, the Cool Grand Jury was impaneled on September 22, 1970.

MR. MANES: September 22, 1970?

THE CLERK: That is correct, counsel.

MR. MANES: And that is the present jury that is still in existence, is that right?

THE COURT: That is the jury before whom, evidently, your client will be called—

MR. MANES: I would say, your Honor, that since Mr. Kastigar has appeared before The Grand Jury September 9, 1970, that his subpoena before this Grand Jury is invalid. That is, his order to—excuse me. Let me withdraw that.

There was a subpoena. But this proceeding [16] is invalid until such time as he has appeared before the Grand Jury and been questioned on those matters which the Government is seeking information.

I would say that since this is the Grand Jury that has come into being since his last appearance that it would be improper for the Government to rely on his past appearance before another Grand Jury to proceed in the fashion that it is.

THE COURT: The clerk tells me he was in error. It was August 21st that they were impaneled?

THE CLERK: That is correct, your Honor, 1970.

THE COURT: Did he appear before that same Grand Jury before, can you tell that?

MR. NISSEN: No, sir, he did not.

THE COURT: He did not.

MR. NISSEN: That jury has expired, to my recollection.

THE COURT: All right. Anything further?

MR. MANES: May I just get one point clear, your Honor?

THE COURT: Yes.

MR. MANES: Am I correct in assuming that this is a new Grand Jury then? [17]

THE COURT: Yes, it is not the Grand Jury—

MR. NISSEN: This Grand Jury has never had Mr. Kastigar before it except this morning.

MR. MANES: I think that the law would require that Mr. Kastigar appear before it, before this newly constituted Grand Jury, before this proceeding may be undertaken, if the court please.

I would like some clarification at least for the record, your Honor, as to whether the old Grand Jury was permanently discharged or whether it was merely excused sine die or some other fashion. May that be clarified for the record?

THE COURT: Does it show?

MR. NISSEN: I do not know, your Honor, and I do not think it is material.

THE COURT: It doesn't show whether they were discharged or not?

THE CLERK: No, your Honor.

THE COURT: Where would that record be?

THE CLERK: That would be in the jury clerk's office on the fifth floor of this building.

THE COURT: All right. Go ahead.

MR. MANES: If it please the court, may those records or the information therefrom be obtained so I may complete the record prior to this point. [18]

TE COURT: Can you go up and get them?

THE CLERK: Yes, your Honor.

THE COURT: All right. Anything further now?

MR. MANES: No, your Honor, that completes my presentation, except I would like to please have an opportunity to prepare a memorandum in writing for the court on several points that we have urged.

I think that the issue here is quite a substantial one, and since one federal court has already upheld the position of Mr. Kastigar in this regard, I think it might be worth a little deliberation and consideration

and the opportunity to present your Honor with opposing point of view. We did not really have the opportunity the Government did to present this memorandum.

THE COURT: All right. Counsel, now, for Mr. Stewart.

MR. HOLMES: Yes, your Honor, I, of course, adopt all the substantive matters that Mr. Manes has raised.

THE COURT: Yes.

MR. HOLMES: However, I would like to direct my attention particularly to the procedural matters involved here. We did not have any notice or any reason to believe that Mr. Stewart would be brought before this court and in application for immunity made before this [19] morning when we were so informed.

I didn't have an opportunity, as Mr. Manes did not, to prepare any papers in this matter, but I would request the court to consider the case of In re Phillip Bart, 304 F. 2d 631. That case has been held in this Circuit, your Honor, to be the leading case with respect to procedural requirements for application for immunity under the old immunity statute, not the one that is involved here. However, I believe the procedural questions involved there are certainly analogous, if not identical.

According to the Bart case we are entitled to notice as provided in Rule 6(b) of the Federal Rules of Civil Procedure. We have not received that notice, and I would request, therefore, your Honor, the court's consideration of the Government's application with respect to Mr. Stewart, at any rate, be deferred for the period specified in that rule.

THE COURT: That is a five-day notice, isn't it?

MR. HOLMES: That is correct.

THE COURT: Isn't there something, that the judge can give lesser notice, as I recall?

MR. HOLMES: I believe on a showing of good cause, your Honor, the court does have the discretion to [20] adjust that period to some lesser time. I don't believe any showing has been made in this case.

THE COURT: All right. Go ahead.

MR. HOLMES: Moreover, your Honor, I would address myself to a point that Mr. Manes raised, namely, that the application for immunity gives some notice of the subject matter of inquiry, the nature of the Grand Jury investigation. All these requirements are set out in the Bart case. Although the statutes are different, certainly the considerations are very analogous.

If no such requirement is made, then there is absolutely no judicial function to be played here, except the mere signing of an order. And as Mr. Manes pointed out it is inconceivable that we could be required to come before this court, an application be made to the court and the court have absolutely nothing to consider but the conclusionary representations of the Government.

Further, I would like to state, as Mr. Manes stated, that we rely heavily on the case of In the Matter of the Grand Jury Testimony of Jo Anne Kinoy, a New York District Court decision.

THE COURT: Somebody has furnished me with a copy of that opinion.

MR. HOLMES: Very well. That will complete my presentation, your Honor. I am unable to make a more [21] thorough presentation at this time because I have had absolutely no notice, no opportunity to prepare.

I request that this matter be stayed, that the application of the Government be considered according to the notice requirements of Rule 6(b).

MR. MANES: May I, your Honor, on behalf of Mr. Kastigar join in that request, and reliance upon the Bart decision, of course.

THE COURT: All right. Mr. Nissen.

MR. NISSEN: With regard to counsel's argument that the statute is unconstitutional, the Constitution clearly says that no person in a criminal case shall be compelled to be a witness against himself.

The statute here says that the testimony shall not be used against him directly or indirectly. In other words, not his testimony or any leads therefrom.

Counsel for Mr. Kastigar raises the specter—and I have not read Judge Motley's—but if the judge said what he says she said the witness would have the burden of showing that the testimony was tainted. Of course, that is utter nonsense. The courts here routinely require the Government to show that testimony is not tainted. I think the judge there was looking for an out and not looking at the Constitution.

The two cases cited in our memorandum obviously [22] do not pass upon this statute because the statute became effective December 15, 1970. However, those two cases are the basis upon which the statute was enacted, because they say complete immunity from future prosecution—or they indicate it would not be essential. All that is essential is that it be coextensive with the witness' purpose against him. This is what the statute does.

Now, Mr. Manes says the statute makes this court ministerial in its function. He wants the court to find

out how come this is necessary, what the facts are, the scope of the inquiry, the nature and purpose, and so forth. The statute makes it very plain that the court's function is ministerial. The court is not informed and cannot be as informed as the Grand Jury or the U.S. Attorney, unless the court would sit with us to do our work, and the court simply doesn't have that responsibility nor the time.

Mr. Manes says the affidavit is defective because it doesn't produce facts. Well, this court in the Ninth Circuit has written an opinion in the case involving Nicolo Licata, L-i-c-a-t-a. That opinion was vacated by the Supreme Court on the ground that the issue had become moot by virtue of the Grand Jury's expiration before the case was docketed in the Supreme Court. But the force of the Licata opinion is still 100 percent effective. It's the thinking of the Ninth Circuit on the immunity statute. [23]

All these objections were raised. The affidavit doesn't tell the facts.

THE COURT: What is that case?

MR. NISSEN: It is In re Nicolo Licata, Li-c-a-t-a. It was in slip opinion only the last time I saw it. It may now have gotten into the Fed. Reporter system in 1970 very late, if it is published yet at all.

THE COURT: Spell the name, would you, please?

MR. NISSEN: N-i-c-o-l-o.

THE COURT: In re Nicolo Licata?

MR. NISSEN: Yes, L-i-c-a-t-a.

THE COURT: You said it came down in December?

MR. NISSEN: In the last month or two of the year.

THE COURT: You don't have the date?

MR. NISSEN: No.

THE COURT: You don't have the slip opinion?

MR. NISSEN: I didn't bring the slip with me. It is in my Licata file.

In that case all the issues raised here, the notice provisions, the In re Bart argument and all the rest are raised, In re Bart has nothing to do with this type of statute. It has to do with an immunity statute relating to national security, where the judge has to make [24] the finding that it affects national security. Here Congress has given the court no function at all. The Licata case says it is ministerial, it is ex parte. We can get an immunity order without their even being here and then your Honor could order them to answer with them being present and hold them in contempt if they didn't.

I might say with regard to Mr. Manes' argument that this is a different Grand Jury than that which Mr. Kastigar appeared before. We acknowledge that and merely point out that the statute says only that he either has taken his privilege—in other words, that he has either taken the Fifth Amendment, or that he is likely to do so. The precise language is as follows, "such individual has refused or is likely to refuse to testify or provide other information . . ."

THE COURT: Is the subject of the inquiry the same as the inquiry in September?

MR. NISSEN: Yes, sir. That is not an issue, but it is.

THE COURT: It is not an issue but they are complaining about it, they don't even know what—

MR. NISSEN: No witness is entitled to know what the Grand Jury is doing, your Honor, whether they are being sought to be compelled for immunity or because they just want to know before they go in. They don't

[25] have that right. If they did they would be sitting as the 24th member of the Grand Jury.

THE COURT: He says they are entitled to know what the nature of the inquiry is.

MR. NISSEN: Why are they so entitled?

THE COURT: You wouldn't be coming in with the motion unless you had some reason to think that they were going to allege the Fifth Amendment or set up the Fifth Amendment as a defense to testifying.

MR. NISSEN: That is true, your Honor.

THE COURT: So you have to base that on something. I think they are entitled to know what you are basing it on.

You are basing it on the questions asked in September.

MR. NISSEN: We are basing it on the fact he has been asked and he did take the Fifth Amendment, which is all the statute requires. But he doesn't have to. It is just the fact that he is likely to. Both of them have—

THE COURT: I understand that.

MR. NISSEN: Yes.

THE COURT: They know the nature of the inquiry because the inquiry has already been made and they have said they were going to take the Fifth. [26]

MR. NISSEN: Your Honor, they know they have taken the Fifth, but I don't know that they know the nature of the inquiry. They are not entitled to.

THE COURT: I know, but they know the questions that were asked them.

MR. NISSEN: Well, certainly, they know the questions.

THE COURT: Yes. That is what I am talking about.

MR. NISSEN: But whether that tells them the nature of the inquiry or not, I couldn't say.

THE COURT: That is what I had in mind, when I said the nature of the inquiry, I meant the questions that they had been asked. They know the questions that they have been asked.

MR. NISSEN: Yes.

THE COURT: What about this notice he talks about?

MR. NISSEN: Your Honor, the case In re Bart is not the leading case on notice. That case is dead wrong on notice, and the Licata case, counsel for Licata made just that complaint, "We didn't get the civil notice." It is not a civil case.

No. 2, the Licata case says they don't get the civil notice, they are not entitled to it. [27]

No. 3, I would like to hear from counsel what is it that they need five days' notice for? We didn't even know that Mr. Stewart was going to take the Fifth until he showed up this morning. If he needs five days for something it is not apparent to us.

All we are saying is if the statute authorizes it you can be required to answer and it can't hurt you. What that takes five days for is a mystery and they weren't able to tell you. They would like five days to put something in writing that they have already said here. But the Licata case simply holds that this is not a requirement.

THE COURT: All right. Anything further?

MR. NISSEN: No, your Honor.

THE COURT: This is a new statute and I think I should take a little time to review these authorities.

MR. NISSEN: Yes, sir, it is a new statute.

THE COURT: I would propose to put this over until tomorrow to give me an opportunity to read these authorities.

MR. NISSEN: If your Honor wishes to have time to do that. What I would like your Honor to do is to put it over for a week so that the Grand Jury would be in session and we could—or put this matter over until tomorrow and then have the witnesses ordered back next week so that we don't have to bring the Grand Jury in [28] tomorrow. They are not planning on it.

THE COURT: I see. Well, let's put this matter over until tomorrow and then I can have an opportunity and counsel can have an opportunity to read these authorities.

MR. MANES: Your Honor, —

THE COURT: Yes.

MR. MANES: Excuse me for interrupting your Honor, but in view of the fact that the Government has indicated that the Grand Jury is not to return until next Thursday I wanted to indicate to the court that I have been and am now engaged in a trial in the State court in Department 40. The court was kind enough to let me off this morning so I might make this appearance here.

I would ask the court if the court would be good enough to put this matter over until Thursday, that is, this coming Thursday, a week from today.

THE COURT: You see, I have problems, too. I am going to be on trial.

MR. MANES: There is another reason for it, Judge.

THE COURT: I am going to decide this before that.

MR. MANES: All right.

THE COURT: You don't have to be here. You [29] have presented your authorities, and all. The only reason I am hesitating now is that I want to read them.

MR. MANES: Yes, your Honor.

THE COURT: I know what some of these cases hold, but I want to read them and I want to be fair about it.

MR. MANES: Judge, if your Honor wishes to make a decision before Thursday of next week, may we respectfully request that the matter be put over until Wednesday? That will also have the additional benefit of enabling us to work over the weekend to prepare additional authorities, should we find any, to submit to you by Monday or Tuesday.

THE COURT: I have no objection to putting it over. I can put it over until Wednesday. I have cases set, of course, for next week. I think Wednesday I could hear it.

MR. NISSEN: I can't be here Wednesday at all. I will be absent from the building all day Wednesday.

THE COURT: You have cited everything you have in mind that you want me to consider?

MR. NISSEN: Yes, sir.

THE COURT: If you can't be here Wednesday, I can rule on it—I will rule on it Thursday but I won't hear any more argument on Thursday. You can file whatever [30] you want by Tuesday and I will rule on it on Thursday, if you want to handle it that way.

MR. MANES: May I consult with my colleague, your Honor?

THE COURT: Yes. But there will be no more argument about it, other than what you file.

I would rather rule on it before, much prefer to. I will be in a position to rule on it before.

What about Tuesday?

MR. NISSEN: Monday or Tuesday.

MR. HOLMES: Thursday would be satisfactory without additional authorities.

THE COURT: I understand it would be, counsel, but I have a trial on Thursday and I am going to be very busily engaged on Thursday.

If it were an emergency and came down on Thursday I would have to do something about it, but it isn't now, because we have a whole week here.

MR. HOLMES: Yes, your Honor.

THE COURT: I am giving you an opportunity. I can hear it tomorrow, but counsel has problems because he is on trial. I want to adjust and be as reasonable as I can be, but everybody has problems and so does the court. I can't do it next Thursday, I can't devote the time to it next Thursday. [31]

MR. HOLMES: I was just going to suggest, your Honor, that we don't anticipate any additional argument on our part.

MR. MANES: We would be willing to submit the additional authorities.

MR. HOLMES: And have a ruling at a time that is convenient with the court.

THE COURT: Then file your additional authorities.

Mr. Nissen, would you give me the date this Licata case was decided?

MR. NISSEN: I will give you the date and number, your Honor, right away.

THE COURT: I don't care about the number, but I want the date of the slip sheet. Then I can find it.

MR. MANES: Your Honor, may I say a word about the Licata case?

THE COURT: Yes.

MR. MANES: It is brand new to me, too, as it is to your Honor.

THE COURT: Surely.

MR. MANES: But just from what counsel has indicated about it, may I respectfully suggest, your Honor, it is not authority in this Circuit where it appears it was held moot by the United States Supreme Court. There has [32] been no opportunity, therefore, to review that decision, and I just have some—

THE COURT: What do you mean it is moot, it is held to be moot?

MR. MANES: I am relying on counsel's indication. I thought I understood him to say that it went up to the United States Supreme Court and was denied for mootness. I may be in error—

MR. NISSEN: Moot because the Grand Jury had been discharged by that time.

MR. MANES: So if that is so, I question the validity of it.

THE COURT: It would still be the authority in this Circuit. So far as the Ninth Circuit Court of Appeals, they have ruled and the only reason this rule hasn't gone into effect is because the Grand Jury has been dismissed, so as far as I am concerned that would still be the rule of the Ninth Circuit, it seems to me.

MR. HOLMES: Your Honor, with respect to counsel's point that the Licata case represents the thinking of the Ninth Circuit, with respect to notice, I would like to read to the court from a decision dated January 18, 1971. That is the case of United States of America v. Lee Wineberg, et al. Several other cases were consolidated with it. [33]

THE COURT: Yes, I remember that.

MR. NISSEN: I think that case has the cite to Licata in it, too.

THE COURT: There are two Wineberg cases. One of them was the release on bond, as I recall.

MR. NISSEN: Yes.

THE COURT: Then there was the decision—

MR. NISSEN: Yes.

THE COURT: —deciding the case.

Now, which one are you talking about?

MR. HOLMES: I am talking about the decision deciding the case. It is No. 26903.

THE COURT: January 18, 1971?

MR. HOLMES: Yes. The Ninth Circuit in that case held as follows:

> "The leading case prescribing the proceeding to be followed in proceedings under 18 USC 2514 for granting of immunity and directing of a witness to answer questions before the Grand Jury was In re Bart, 304 F. 2d 631, D.C. Circuit 1962."

They cite the Licata case and simply state that it was vacated as moot. The Licata citation is 429 F. 2d 1177. It unequivocally states that—

THE COURT: That isn't the one that was [34] cited late in December, is it?

MR. NISSEN: That is the case I was referring to.

THE COURT: 429 F. 2d 1177.

MR. HOLMES: That is correct, your Honor. They leave no question, your Honor, that the thinking of the Ninth Circuit is that the procedural requirements are those set out in In re Bart.

THE COURT: You are going to get your five days now because it isn't going to be heard until next Thursday. For a ruling on this, let's set it for 9:00 o'clock next Thursday.

MR. MANES: Yes, your Honor. May the respondent witness Mr. Kastigar—he does not have to return until that date, is that my understanding?

THE COURT: Yes, that is my understanding. Is that when you want them to return, Mr. Nissen?

MR. NISSEN: Yes, sir. Will the court order both Mr. Kastigar and Mr. Stewart to return at 9:30 on next Thursday?

THE COURT: Yes.

MR. MANES: The court said 9:00 o'clock.

MR. NISSEN: 9:30 for the Grand Jury. I think they had better be here to be ordered to answer, your Honor. [35]

THE COURT: Yes. Mr. Kastigar—

MR. KASTIGAR: Right here.

THE COURT: And Mr. Stewart—

MR. STEWART: Right here.

THE COURT: You gentlemen are ordered now to return to this courtroom at 9:00 a.m. on next Thursday. That is a week from today and that is February 11th, at 9:00 o'clock. Be sure and be here at 9:00. Let's not have any misunderstanding about it. Everybody, counsel and all, 9:00 o'clock, because I am going to be very busily engaged at 9:30.

If either side wants to file any more authorities, file them so they are delivered and filed here in court not later than 12:00 o'clock noon on Tuesday. Not later than 12:00 o'clock noon on Tuesday. And either side or both can file any further authorities you want. Be sure they are filed not later than 12:00 o'clock Tuesday.

MR. MANES: Your Honor, just one thing more. The clerk, I thought, was going to ascertain—

THE COURT: Yes. What did you find?

MR. CLERK: Your Honor, without the knowledge from Mr. Nissen which Grand Jury it is, I cannot obtain that information. He does not have it available at the present time.

THE COURT: You don't know the name of the [36] Grand Jury?

MR. NISSEN: We had fourteen Grand Juries at that time and I couldn't tell you from recollection which one it was.

THE COURT: You can't ascertain that?

MR. NISSEN: I can ascertain it, yes.

THE COURT: Ascertain it and call Mr. Manes.

MR. NISSEN: Perhaps I can inform him when I see him here again.

THE COURT: When?

MR. NISSEN: When I see him here again, which would be next Thursday.

MR. MANES: Well, I would like to know before that, though.

THE COURT: He wants to know before.

MR. MANES: So I can—

THE COURT: If you can tell the clerk of the date that the Grand Jury before whom Mr. —

MR. NISSEN: I know the date. It was September 9th.

THE COURT: I know, but you don't know which Grand Jury it was, so you don't know whether they were dismissed or what terminated their service, how it was terminated.

Isn't that what you are interested in?

MR. MANES: Yes, your Honor. [37]

MR. NISSEN: I am not even 100 percent sure it was terminated, but I just assume that it was. I don't know.

THE COURT: There will be no problem that I can see in giving him the information.

MR. NISSEN: I see no relevance—

THE COURT: There may not be. I am not going to determine that. But give him the information or give it to the clerk and I am asking the clerk to call Mr. Manes and give him that information.

You know what information it is?

THE CLERK: Yes, sir.

THE COURT: He wants to know whether that Grand Jury, before whom Mr. Kastigar appeared, has been terminated, and if so, in what manner its services were terminated.

THE CLERK: Yes, sir.

THE COURT: All right.

MR. MANES: Thank you, your Honor.

THE COURT: 9:00 o'clock next Thursday, February 11th.

(Whereupon, at 11:25 o'clock a.m., Thursday, February 4, 1971, an adjournment was taken until 9:00 o'clock a.m., Thursday, February 11, 1971.) [38]

In the United States District Court, Central District of California.

Honorable E. Avery Crary, Judge Presiding.

In the Matter of Michael Gorean Stewart and Charles Joseph Kastigar. No. 2649-Misc. and No. 2650-Misc.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California.

Date: Thursday, February 11, 1971.

Virginia K. Wright, Official Reporter. [39]

APPEARANCES:

For the Plaintiff: Robert L. Meyer, United States Attorney, By: David R. Nissen, Assistant United States Attorney, 1265 U.S. Courthouse, 312 North Spring Street, Los Angeles, California 90012.

For Michael Gorean Stewart: Margolis, McTernan, Smith, Scope & Herring, By: Oliver Wendell Holmes, Jr., 3325 Wilshire Boulevard, Suite 901, Los Angeles, California 90005.

For Charles Joseph Kastigar: Hugh R. Manes, 3440 Wilshire Boulevard, State 608, Los Angeles 90005. [40]

LOS ANGELES, CALIFORNIA, THURSDAY, FEBRUARY 11, 1971, 9:00 A.M.

THE CLERK: This is Case No. 2650-Miscellaneous Criminal and Case No. 2649-Miscellaneous Criminal, In the Matter of the Testimony of Michael Gorean Stewart and Charles Joseph Kastigar.

Counsel, please announce your appearance.

MR. NISSEN: David Nissen for the United States, your Honor.

MR. HOLMES: Oliver Holmes for Michael Stewart.

MR. MANES: Hugh Manes appearing for Mr. Kastigar.

THE COURT: Very well, gentlemen, I have read Mr. Manes' authorities and the cases cited by the Government.

The issue, it seems to me, is, does the witness incriminate himself if his testimony could not be used directly or indirectly against him.

The Fifth Amendment, as we know, provides that a person shall not in a criminal case be compelled to be a witness against himself.

So if the witness testifies, does he incriminate himself by that testimony, if his testimony cannot be used against him either directly or indirectly. [41]

The cases divided on the question of whether the stautes, with provisions similar to those in the Organized Crime Control Act, the new Act which sets up the standard of immunity different from the prior standard. They divide on the question of whether the standard in the Control Act requires immunity from prosecution or immunity from the transaction, it is sometimes termed, or from use of the testimony and evidence obtained by its use directly or indirectly.

The District Court of the Southern District of New York has very clearly stated that it concludes that the new statute should be interpreted as a use statute and it violates the Fifth Amendment as such, since it does not preclude prosecution. That is the Kinoy case, which you are both familiar with, which Judge Motley decided and the opinion I am sure all counsel has read. It was furnished to me and which I read carefully.

That decision, of course, is supported, depending upon how you interpret the Counselman case. But it is relied on heavily and the position of the witnesses in this case is supported at least in their contention by the Counselman case.

I am not going to go into the Counselman case. That is the case in 142 United States Supreme Court. It is the old case which they all go back to. There have [42] been other decisions since then, of course, Albertson, and there are several other cases that go back to the Counselman case and recite that provision in the Counselman case, which, in effect, says there must be absolute immunity.

We know that in the Counselman case the statute involved did not include immunity from the use of the testimony directly or indirectly.

Now, the other side, that is, the ones that support the use immunity position, rely on the Murphy case, and that, Mr. Manes points out, is a dual jurisdiction case. And also on Gardner v. Broderick, at 392 U.S. 273, 276 in particular.

Now, the question of the dual jurisdiction, that matter was discussed in the New Jersey Supreme Court case, Zicarelli v. New Jersey State Commission of Investigation, in 261 Atlantic 2d 129. That case involved the similar situation that we have here, the interpretation of the statute which is a use statute as such, that does preclude, in addition to the testimony, the use of the testimony in any criminal prosecution, it precludes the use of any evidence obtained by the direct or indirect use of such testimony. That is a 1970 decision of the Supreme Court of New Jersey.

On this point of duality, the court at page 140 says: [43]

> "There is a difference in that Murphy dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, that is, what immunity the Fifth Amendment requires in exchange for complusion to answer. The values involved are the same. We see no sensible basis for a different answer. Gardner v. Broderick treat-

ed the issue as one and the same, citing both Counselman and Murphy. Murphy held and Gardner repeated that the Fifth Amendment requires protection only from the use of the compelled testimony and the leads it furnishes, and that protection our statute expressly provides."

Then they cite McClosky.

Now, Justice White also in the Murphy case in his concurring opinion, I conclude from reading that concurring opinion that he also indicates that the dual jurisdiction doesn't create an issue.

Now, as to the point that the new standard does not protect against the possiblility of prosecution, based in part on the compelled testimony, that is discussed [44] by Justice White in the concurring opinion in the Murphy case, 378 U.S., at pages 101 and 102. He discusses Counselman at length, and at 101 he says:

"It is argued that a rule only forbidding use of compelled testimony does not afford absolute protection against the possibility of a federal prosecution based in part on the compelled testimony. It is said that absent any deliberate attempt by federal officers to utilize the testimony the very identification of testimony of the witness in the state proceedings, perhaps in the newspapers, may increase the possiblility of a federal prosecution and alternatively that the defendant may not be able to prove that evidence was intentionally and unlawfully derived from his compelled testimony. These are fanciful considerations, hardly sufficient as a basis for a constitutional adjudication work-

ing a substantial reallocation of power between state and national governments."

Then he goes on and discusses the point further, saying:

"The danger that a defendant may not [45] be able to establish that other evidence was obtained through the unlawful use by federal officials of inadmissible compelled testimony is insubstantial. The privilege protects against real dangers, not remote and speculative possibility."

And he cites Brown v. Walker and Heike v. United States and Mason v. United States. And going on:

"First, one might just as well argue that the Constitution requires absolute immunity from prosecution wherever the Government has obtained an inadmissible confession or other evidence through an illegal search and seizure, an illegal wiretap, illegal detention, and coercion. A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege."

And then it goes on with Malloy v. Hogan, and so forth, Bram v. United States.

Now, as to the statement of the Supreme Court which is the portion of the Counselman case that gives such impetus to the argument of the witnesses in this case, and in other cases where similar statutes are involved, and [46] that quotation—and I quote from Counselman—"A statutory enactment to be valid must afford absolute immunity against a future prosecution for the offense to which the question related."

That is the portion of the Counselman case that gives support to the position of the witnesses here, although, as I say, I am not goint into the Counselman case and go through it insofar as the statute involved there. There is also the statement, of course, in the Counselman case that they didn't even provide in the statute that evidence obtained by the use of the testimony directly or indirectly would be precluded as a part of the immunity.

As to this point, Justice White at page 105 of his concurring opinion in Murphy said,—he is discussing Counselman and the statement from Counselman—

> "It then invalidated the first immunity statute to come before it because 'the statute could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding. . . . It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which [47] he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.' "

He cites 142 U.S. 547, at 564 of Counselman. And going on:

> "In a dictum indicating that some immunity statutes are valid, the court added that 'a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.' At page 586. Whatever may be the validity of this dictum where the witness is being investigated by a grand jury for

the purpose of indictment for a particular offense and where the grand jury proceedings are conducted by the same government attempting to obtain a conviction for the offense—the facts of Counselman—it clearly has no validity, and by its own terms, no applicability, where the inquiry does not concern any federal offense, no less a particular one, and the government seeking the testimony has no purpose or authority to prosecute for federal crimes. [48]

"The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any causal connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation." [49]

So we have diverse views on this matter. My views are well set forth, I would say, by the Supreme Court of New Jersey in this Zicarelli case, beginning at page 137, over to and including 140.

In the Gardner v. Broderick case, 392 U.S. 273, at 276, the court said: —and they discussed the Murphy case and the Counselman case and the Albertson case and all these other cases that are constantly cited, and properly so. The court said:

"The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Answers may be compelled regardless of the privilege if there is immunity from federal

and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

So I conclude that the witnesses are required to answer the questions under the standard of immunity as prescribed in the Act.

Now, we know that Congress in passing this new Act was well aware of Counselman v. Hitchcock and the Murphy case. The legislative history so indicates. So this is a matter that is something that will probably have to be decided by the Supreme Court. [50]

In the Piccirillo case the court didn't take it, and you know why, and I won't go into that. There is no question but that I would gather from the Piccirillo case, if I am pronouncing it right, but you know the case I am talking about, but what the Supreme Court will do when it finally reaches this issue presented by counsel in this case, of course, anyone can predict. I do think from that case, from the defense, that there are two, possibly three of the judges that have indicated they are not in accord with the immunity under the present statute. In other words, I would conclude that they may well support the transaction immunity as distinguished from the use immunity.

Be that as it may, there is good authority on both sides. It all goes back to Counselman, and whether that is dictum and what the court will finally do—the legislature has, having in mind Counselman and Murphy, that this should be the standard. So until the standard I will follow.

I wouldn't follow it if, in good conscience, I didn't feel it was constitutional. I do feel it is in the circumstances and therefore I will follow it.

There is one thing, however, that I would ask, and I would ask the Government to indicate the subject of the inquiry. I suppose your position is that the new statute doesn't require that. [51]

MR. NISSEN: Your Honor, no statute requires it and we decline to do so. It is a Grand Jury Investigation.

THE COURT: Yes, but the old statute did.

MR. NISSEN: Which one, sir?

THE COURT: The Grand Jury investigation—

MR. NISSEN: The old statute specified certain types of investigation under which that statute could be used.

THE COURT: Even under Bart,, as I recall it,—I don't have Bart here, but Bart said that your affidavit wasn't sufficient. That wasn't because of the subject matter.

MR. NISSEN: In re Bart, your Honor, had nothing to do with either statute we are talking about, your Honor.

THE COURT: I understand it didn't have to do with the statute we are talking about. But I am saying my understanding is that prior to this present statute you were required to disclose the subject matter of the investigation.

MR. NISSEN: Absolutely not. Absolutely not.

THE COURT: What about it, Mr. Manes, is that your understanding? [52]

MR. MANES: It is my understanding and moreover, your Honor, in our memorandum we also pointed out a second point which your Honor has not indicated a ruling on in which that issue comes up, namely, that the affidavit was inadequate in support of the order.

THE COURT: The only indication of the inadequacy of the affidavit, in my judgment, is the issue of

the subject matter. Mr. Nissen is very firm in his position that they don't have to indicate what the subject matter of the investigation is.

My conclusion is that they did. What is the citation of the Bart case? I had it here.

MR. HOLMES: 304 F. 2d 631.

MR. NISSEN: Your Honor, I might call your attention to the statute in this case, Sections 6002 and 6003, which sets out what is required.

THE COURT: I have read that, Mr. Nissen, and I know that is your position. It doesn't say you have to divulge the subject matter. But prior to this statute my understanding is that you did.

MR. NISSEN: That is not true and it never has been true.

THE COURT: Let's see what Bart says.

MR. NISSEN: We have previously listed the statutory violation which the jury was investigating, Title [53] 18 this or that.

THE COURT: Yes.

MR. NISSEN: But we have never said what the subject matter was.

THE COURT: You haven't given that information here, have you?

MR. NISSEN: No, because the statute applies to any grand jury investigation. The 2514 statute applies to the enumerated ones, your Honor.

THE COURT: Are you saying it is only under the investigation by the Grand Jury concerning threatened national security that you have to get one of the listed offenses?

MR. NISSEN: The Bart case related to a specific statute dealing with national security, and the court there dealt with that special statute.

In that situation a different standard and different elements were required. It had to be shown to the court that it affected national security.

THE COURT: Do you have any authorities, Mr. Manes, for your position that the affidavit is insufficient because it doesn't state the subject matter?

MR. MANES: Your Honor, just the authorities we submitted in our memorandum of points and authorities.

THE COURT: What authority? [54]

MR. MANES: Well, of course, our theory was that since the—for the proposition that since the witness was giving up or being compelled to surrender a constitutional right that the reasonable cause provision of the Fourth Amendment that merged into the Fifth, under the theory of Boyd v. United States, your Honor, and that under the cases like Sniadach v. Family Finance, Marcus v. Search Warrants, and even under Joint Anti-Fascist Refugee Committee v. McGrath, that line of cases, your Honor, where, even though the Attorney General may have certain powers which abridge or which limit the First Amendment, I believe, or constitutional right, that they must afford due process.

Our contention here is that the surrender of immunity, without even a hearing—without some kind of support, without a showing by the Attorney General of reasonable cause thus abridges the Fourth and the Fifth together.

THE COURT: I understand now.

MR. MANES: Yes, sir.

THE COURT: Mr. Nissen, what did you have to include in your affidavit prior to the statute in an immunity situation like we have here, prior to this statute?

MR. NISSEN: Instead of the three elements, which are listed in the present application, let me recite [55] for the record—

THE COURT: No Well, I—

MR. NISSEN: I am going to add one to it.

THE COURT: I want to be more specific. What did you have to say with respect to what the investigation concerned?

MR. NISSEN: The standard statement which has, by the way, been approved by the Court of Appeals in Licata, and which was vacated as moot, but not in any way disapproved, was this, your Honor:

No. 1, that the application was made with the approval of the Attorney General, which is also required here.

No. 2, that the judgment of the U.S. Attorney was that it was necessary to the public interest, which is also included here.

THE COURT: Yes.

MR. NISSEN: Thirdly, that the witness had declined to answer under his constitutional right to decline to incriminate himself. That is modified here to be either that he had declined or he is likely to decline. Nonetheless, it is very much the same.

And a fourth element was included as follows: That the proceeding involved an inquiry into possible violation of any violation enumerated in Section 2516 of Title [56] 18, which is the statute dealing with wiretaps, incorporated by reference in 2514. In other words, it was one of the enumerated statutes.

In Licata it said, for example, as that fourth item, "The Grand Jury is presently inquiring into possible violations of Title 18 United States Code, Section 1952.

and other violations of the law." And that is all it said. There was no subject matter, no nothing. It just said that it came within the statute.

This present statute is open for immunity in any and every case and there is no need to say which statutes are the subject matter of the investigation.

I would also point out Mr. Manes is arguing for a probable cause showing to your Honor, to say why we should call the witness, we have to prove that he is going to be worth something. The Grand Jury has no—

MR. MANES: That is not true.

THE COURT: All right. I don't want any more argument on it because I have read all your points and authorities, and so forth.

MR. MANES: I just didn't want your Honor to understand that was my position, as stated by counsel. It was only that a reasonable cause should be shown for grant of immunity, not for calling the witness to testify.

THE COURT: Well, I conclude that the witnesses [57] are required to answer the questions.

Now, have the questions been propounded and have they refused to answer them?

MR. NISSEN: Yes, sir, as I informed you at the previous proceeding. Each one has appeared in the Grand Jury and has declined to answer questions. We are asking the court order them to return and answer the questions.

We have not, of course, gone on to every question we would ask. There is no point in wasting that time.

MR. HOLMES: Your Honor, I would like to clarify one point. Mr. Stewart has declined to answer one question. He hasn't been propounded any other question.

THE COURT: All right. The witnesses Charles J. Kastigar and Michael G. Stewart are ordered to answer the questions on being granted the immunity provided by the statute here involved.

MR. MANES: Your Honor, may I respectfully ask your Honor a question, please?

THE COURT: Yes.

MR. MANES: This has to do with procedure. I am not going to argue.

If the court please, I am advised that if, as and when Mr. Kastigar is brought back before the Grand [58] Jury that he will respectfully decline to answer, thus raising the issue that your Honor has discussed this morning.

I am at this time engaged in a trial, and so that is the reason why I am posing this question to your Honor: May your Honor—would it be psosible for your Honor to consider the granting of bail when that event arises? In view of the substantial question which is raised by this problem, if your Honor please, I think your Honor's opinion indicates there is a substantial issue in the question, and we would respectfully ask that Mr. Kastigar be allowed to bail, reasonable bail or to go on personal surety.

He has been present and attended all sessions required of him pursuant to subpoena, your Honor. He is a resident of this District and has been for some years. He is employed by the Government or employed in a defense industry, and I would respectfully ask your Honor—

THE COURT: What is the Government's position?

MR. NISSEN: Your Honor, the Grand Jury cannot

operate if persons who will not obey court order are admitted to bail.

I might say again that he hasn't refused yet.

THE COURT: I know he hasn't, but he is indicating he is not going to, so I can understand his [59] position.

MR. NISSEN: Yes, your Honor.

THE COURT: If he refuses to answer the questions and I conclude that he is in contempt I will order his confinement.

When will the Grand Jury come back the next time?

MR. NISSEN: The Grand Jury will be meeting regularly possibly once a week.

THE COURT: Then I would stay the order for three days to allow them to go to the Court of Appeals to see if they can get a stay up there.

MR. MANES: I would hope that that would be about five days—

MR. NISSEN: We would object to that.

Your Honor, in the first place, I think your Honor should advise the witnesses, both of them, they are not defendants here, they are strictly witnesses.

THE COURT: They are not defendants, they are strictly witnesses. It is a civil matter.

MR. NISSEN: Has your Honor signed the order, by the way, that they would receive copies of or you will do so this morning?

THE COURT: No, I haven't. Where are the orders? [60]

MR. NISSEN: They were—

THE COURT: Here they are. They were given to me.

I can't make any promises, Mr. Manes, as to—I won't grant them bond, I won't grant them bail. Obviously, the Grand Jury couldn't operate.

I might grant them a stay, Mr. Nissen.

MR. NISSEN: Could I first ask your Honor to advise both witnesses that if they decline to obey your order that they may be held in civil contempt and confined until they do?

THE COURT: Yes. You are so instructed, both Mr. Kastigar and Mr. Stewart, if you refuse to answer the questions you may well be found to be in contempt. If you are found to be in contempt you will be ordered confined to jail until you answer the questions or until the Grand Jury term expires.

MR. NISSEN: Might I say this, also, your Honor: We will argue, of course, if they ask for a stay, and at the appropriate time this occurs we will argue against it. I would like to point out—

THE COURT: I am not saying I am going to give the stay.

MR. NISSEN: The present statute indicates that the Court of Appeals must decide the question within [61] thirty days. The Court of Appeals could decide, No. 1, whether to admit them to bail. No. 2, they would have to decide it within thirty days.

THE COURT: Whether they are going to be admitted to bail, that is why I would grant the stay, if I do, to allow them to go to the Court of Appeals. I will not grant the bail.

They may send them back to me to fix bail, you know that.

MR. NISSEN: I don't know it, but—

THE COURT: You know it has happened.

MR. NISSEN: It has happened once and I hope it never happens again.

THE COURT: Well, I know, but it has happened.

MR. NISSEN: Will you instruct the two witnesses to report to the Grand Jury room on the 13th floor, your Honor?

THE COURT: Yes. On the 13th floor, is it?

MR. NISSEN: Yes.

THE COURT: They have been up there?

MR. NISSEN: Yes.

THE COURT: Mr. Stewart and Mr. Kastigar, are you here?

MR. KASTIGAR: Yes.

MR. STEWART: YES. [62]

THE COURT: Do you both know where the Grand Jury room is on the 13th floor?

MR. KASTIGAR: Yes.

MR. STEWART: Yes.

THE COURT: You are ordered to appear up there now.

Here are the orders.

(Whereupon, at 9:30 o'clock a.m., Thursday, February 11, 1971, an adjournment was taken.) [63]

LOS ANGELES, CALIFORNIA, THURSDAY, FEBRUARY 11, 1971, 11:05 A.M.

MR. NISSEN: Your Honor, David Nissen representing the United States.

MR. HOLMES: Oliver Holmes for Michael Stewart, your Honor, and I am appearing in behalf of Hugh Manes for Mr. Kastigar at this proceeding.

MR. NISSEN: Your Honor, both witnesses have returned to the Grand Jury room and refused to answer

questions put to them on the grounds of the Fifth Amendment, despite your Honor's order.

I would like to call the Grand Jury reporter briefly to read for your Honor the brief segment of questions and refusals, so it won't be just my word it happened but it will be a sworn testimony.

THE COURT: Very well.

MR. NISSEN: Rick Franks, please.

RICK FRANKS,

called as a witness, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

Will you state your name and spell it, please.

THE WITNESS: My name is Rick Franks, F-r-a-n-k-s. [64]

DIRECT EXAMINATION

BY MR. NISSEN:

Q Are you a shorthand reporter, Mr. Franks?

A Yes, I am.

Q Authorized to report proceedings before the Federal Grand Jury?

A Yes, I am.

Q Have you on this day been present in the Grand Jury room when two witnesses, one named Charles Kastigar and the other named Michael Stewart, appeared in the room?

A Yes.

Q Let's take Mr. Kastigar's testimony, please, and have you recorded on your stenotype tape questions asked of him and his answers?

A Yes.

Q Have you done the same with Mr. Stewart?

A Yes.

Q Are you able to read from those correctly what occurred in there?

A Yes.

Q Would you read, please, first Mr. Kastigar's part where he is questioned and the answers he gave.

A This is question by Mr. Nissen:

"Mr. Kastigar, as we told you before, [65] the Grand Jury has received a great deal of information concerning a situation in which you had orthodontic braces placed on your teeth just prior to reporting for military induction and had them removed just after a word by a Dr. Bernard Bender, with offices at 8328 De Soto in Canoga Park.

"Would you tell us, please, how that came about?

"A I'm sorry, I decline to say anything about that on the basis that my answer may tend to incriminate me and on the advice of counsel."

That was one question that was phrased like that. And then the next question by Mr. Nissen is:

"Do you intend to take that same position with respect to all questions concerning this subject matter, so we don't waste your time or our time?

"A I intend to take the Fifth Amendment.

"Q Even though the court has instructed you to answer?

"A That is correct."

Q All right. Now take Mr. Stewart and read [66] us the questions asked of him and his answers.

A This is a question by Mr. Nissen and Mr. Stewart is answering:

"Q Would you please tell us how it came about that you went to Dr. Bender for the so-called dental services which I described?

"A Okay. On that I will have to respectfully decline to answer on the ground it may incriminate me.

"Q You have been told here in court by the judge that you are under the immunity statute and nothing you say can be used against you?

"A I understand.

"Q Are you refusing to answer on any other grounds or for any other reason, other than self-incrimination?

"A I will use self-incrimination."

And that is it.

MR. NISSEN: Your Honor, we ask the court to instruct Mr. Kastigar to answer the questions propounded to him and Mr. Stewart the ones propounded to him, and to hold them in civil contempt if they persist in their refusal.

THE COURT: Mr. Stewart, you are ordered to [67] answer the questions propounded to you and as you have heard read.

Do you refuse to?

MR. STEWART: Yes, I do, sir.

THE COURT: On the ground it might incriminate you?

MR. STEWART: Yes.

THE COURT: You heard the court's ruling this morning, that if you did refuse you would be guilty of contempt of the court and ordered to be imprisoned, you understood that?

MR. STEWART: Yes.

THE COURT: The court finds that you are in contempt of court, by reason of your refusal to answer the questions, and you are committed to the custody of the Attorney General of the United States until the questions are answered or during the term—

MR. NISSEN: The life of the Grand Jury?

THE COURT: —the life of the Grand Jury.

MR. HOLMES: Your Honor, with respect to Mr. Stewart's confinement, I request that be stayed to give us an opportunity to apply for a stay and/or bail.

THE COURT: When does this Grand Jury meet again?

MR. NISSEN: Your Honor, it meets Thursday [68] next week. Could we be heard on the matter of stay after you have also dealt with Mr. Kastigar?

THE COURT: Yes.

Mr. Kastigar, you are ordered to answer the questions as submitted and as read by the reporter.

Do you refuse to answer them?

MR. KASTIGAR: I take the Fifth Amendment, your Honor.

THE COURT: You refuse to answer them on the ground it might incriminate you?

MR. KASTIGAR: Yes, sir.

MR. NISSEN: Would your Honor make it plain that you are now ordering him to answer and asking him if he now refuses.

THE COURT: I am now ordering you to answer those questions. Do you now refuse to answer them?

MR KASTIGAR: Your Honor, I respectfully decline to answer them as my answers may tend to incriminate me and on the advice of counsel.

THE COURT: Very well. You have heard my ruling this morning and my instructions to you that if you refuse to answer them you would be in contempt of court and subject to imprisonment.

MR. KASTIGAR: I heard your ruling.

THE COURT: The court finds that the witness [69] Kastigar is in contempt of court and commits him to

the custody of the Attorney General of the United States until the questions are answered or during the life of the Grand Jury.

Now, what about the stay?

MR. HOLMES: Your Honor, I—

THE COURT: I understood your request. Now I want to hear from the Government.

MR. NISSEN: Your Honor, in the first place, the Grand Jury proceeding is thwarted when delays occur and witnesses will not fulfill their obligations.

Now, in the past, in the Licata case, for example, stays, continuances, bail were requested, requested and requested, and refused all the way to the Supreme Court.

Your Honor mentioned a case this morning and I think you are referring to the same case I was thinking of, in which the Ninth Circuit granted bail and then decided the case within thirty days, as the law requires it to.

We are asking the court here, not only not to grant bail, as you say you won't, but to refuse a stay and let these witnesses approach the Court of Appeals, which has all the authority in the world to issue a stay if one is meritorious. That way we can at least get before the court to see whether a stay is appropriate.

THE COURT: I understand your position, Mr. [70] Nissen. If this question were well determined and I didn't think there was a substantial issue here I wouldn't grant the stay.

In the circumstances I do and I am going to grant the stay for three days.

MR. HOLMES: Your Honor, may I just indicate we are facing a four-day holiday.

THE COURT: Well, I am going to grant the stay for three days. I will grant the stay until noon—we

have a holiday there. I will grant the stay until noon, February 16th; at 12:00 o'clock noon, Februrary 16th.

Mr. Kastigar and Mr. Stewart,—

MR. STEWART: Yes.

MR. KASTIGAR: Yes.

THE COURT: —your imprisonment is stayed until 12:00 o'clock noon, February 16th, that is Tuesday, February 16th, and you are ordered to report to the United States Marshal on the Main Street floor of this building not later than 12:00 o'clock noon on February 16th, without fail.

If you do not, of course, a bench warrant will be issued for your arrest. So be sure you report to the Marshal not later than 12:00 o'clock noon.

All right.

MR. HOLMES: Thank you, your Honor. [71]

(Whereupon, at 11:15 o'clock a.m., Thursday, Febuary 11, 1971, an adjournment was taken.) [72]

In the United States District Court, Central District of California.

In the Matter of: Michael Gorean Stewart and Charles Joseph Kastigar. No. 2649—Misc. and No. 2650—Misc.

CERTIFICATE

I, Virginia K. Wright, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 72 pages are a true and correct transcript of the proceedings had in

the above-entitled matter on February 4 and February 11, 1971, and that said transcript is a true and correct transcript of my stenographic notes.

Dated at Los Angeles, California, this 26th day of February 1971.

/s/ Virginia K. Wright
Virginia K. Wright
Official Reporter [73]

Application for Immunity. 18 U.S.C. §§ 6002, 6003.

United States District Court, Central District of California.

In the Matter of Michael Gorean Stewart. 2649-Misc.

Filed: Feb. 4, 1971.

The United States of America hereby moves the Court for an order instructing Michael Gorean Stewart to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003, and respectfully represents as follows:

1. A duly constituted grand jury is presently inquiring into alleged violations of laws of the United States.

2. Michael Gorean Stewart has been subpoened to appear before the Grand Jury on February 4, 1971 and is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

3. This application is made in good faith, with the approval of the Attorney General of the United States, by the United States Attorney, in whose judgment the testimony of Michael Gorean Stewart is necessary to the public interest.

WHEREFORE, the United States of America requests the Court to ORDER Michael Gorean Stewart to answer questions and produce evidence relating to all matters pertinent to the pending grand [1] jury

inquiry, pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

/s/ David R. Nissen
DAVID R. NISSEN
Assistant U. S. Attorney
Chief, Criminal Division [2]

Affidavit.

State of California, County of Los Angeles—ss.

ROBERT L. MEYER, being first duly sworn, deposes and says:

1. I am United States Attorney for the General District of California;

2. This application is made in good faith with the approval of the Attorney General of the United States;

3. In my judgment the testimony of Michael Gorean Stewart sought is necessary to the public interest and material to the investigation now being conducted by the grand jury;

4. The grand jury is presently inquiring into alleged violations of laws of the United States.

5. Michael Gorean Stewart has been subpoened to appear before the grand jury on February 4, 1971 and is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Robert L. Meyer

Subscribed and Sworn to before me this 4th day of February, 1971.

Kathryn A. Clark

Notary Public in and for said County and State

My Commission expires:

[Seal].

Official Seal Kathryn A. Clark, Notary Public. California Principal Office in Los Angeles County. My Commission Expires December 29, 1972.

Order.

United States District Court, Central District of California.

In the Matter of Michael Gorean Stewart. 2649-Misc.

Filed: Feb. 11, 1971.

The United States of America, having made written and oral application for an order compelling Michael Gorean Stewart to testify and produce evidence before a duly constituted grand jury of the Central District of California, pursuant to Title 18, United States Code, Sections 6002 and 6003, and

Michael Gorean Stewart, being likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, the grand jury being engaged in an inquiry into alleged violations of laws of the United States; and

The application for immunity having been approved by the Attorney General of the United States and made by the United States Attorney in whose judgment the testimony sought is necessary to the public interest, it is

ORDERED that Michael Gorean Stewart appear forthwith before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury.

DATED: Feb. 11, 1971.

E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

Application for Immunity. 18 U.S.C. §§ 6002, 6003.

United States District Court, Central District of California.

In the Matter of Charles Joseph Kastigar. 2650-Misc.

Filed: Feb. 4, 1971.

The United States of America hereby moves the Court for an order instructing Charles Joseph Kastigar to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003, and respectfully represents as follows:

1. A duly constituted grand jury is presently inquiring into alleged violations of laws of the United States.

2. Charles Joseph Kastigar was subpoenaed to appear and did appear before the grand jury on September 9, 1970, at which time he refused to answer questions on the ground that his answers might tend to incriminate him.

3. This application is made in good faith, with the approval of the Attorney General of the United States, by the United States Attorney, in whose judgment the testimony of Charles Joseph Kastigar is necessary to the public interest.

WHEREFORE, the United States of America requests the Court to order Charles Joseph Kastigar to answer questions and produce evidence relating to all matters pertinent to the pending grand [1] jury inquiry, pur-

suant to the provisions of Title 18, United States Code, Section 6002 and 6003.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

/s/ David R. Nissen
DAVID R. NISSEN
Assistant U. S. Attorney
Chief, Criminal Division [2]

Affidavit.

State of California, County of Los Angeles—ss.

ROBERT L. MEYER, being first duly sworn, deposes and says:

1. I am United States Attorney for the Central District of California;

2. This application is made in good faith with the approval of the Attorney General of the United States;

3. In my judgment the testimony of Charles Joseph Kastigar sought is necessary to the public interest and material to the investigation now being conducted by the grand jury;

4. The grand jury is presently inquiring into alleged violations of laws of the United States;

5. On September 9, 1970, Charles Joseph Kastigar appeared before the grand jury and invoked the constitutional privilege against self-incrimination and refused to answer.

Robert L. Meyer

Subscribed and sworn to before me this 4th day of February, 1971.

Kathryn A. Clark

Notary Public in and for said County and State

My Commission expires:

[Seal].

Official Seal, Kathryn A. Clark, Notary Public. California Principal Office in Los Angeles County. My Commission Expires December 29, 1972.

Order.

United States District Court, Central District of California.

In the Matter of Charles Joseph Kastigar. 2650-Misc.

Filed: Feb. 11, 1971.

The United States of America, having made written and oral application for an order compelling Charles Joseph Kastigar to testify and produce evidence before a duly constituted grand jury of the Central District of California, pursuant to Title 18, United States Code, Sections 6002 and 6003, and

Charles Joseph Kastigar, on September 9, 1970, having declined to answer questions before the grand jury by claiming his privilege against self-incrimination, the grand jury being then engaged in an inquiry into alleged violations of laws of the United States; and

The application for immunity having been approved by the Attorney General of the United States and made by the United States Attorney in whose judgment the testimony sought is necessary to the public interest, it is

ORDERED that Charles Joseph Kastigar appear forthwith before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury.

DATED: Feb. 11, 1971.

E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

Criminal Minutes—General.

United States District Court, Central District of California.

Case No. 2650-Misc. Crim.

Date February 11, 1971.

DOCKET ENTRY:

In the Matter of Grand Jury Testimony of Charles Joseph Kastigar. Ct & cnsl confer. Govt states wit has refused to testify before G./J. Ct reporter C.S.T. as to Q. propounded to wit. Ct ords wit to ans Q. Wit refuses to ans. Ct finds wit in contempt of Ct & ord wit committed to Custody of A/G unitl Q.'s are ans or until G/J discharged. Cnsl moves Ct for stay of exec. Cnsl argue mot for stay. Ct grants stay of exec to 12 noon on Feb 16, 1971. Wit to surr to U.S. Marshal on that date or B/W issue for his arrest. (EAC)

PRESENT: HON. E. Avery Crary, JUDGE, Wayne E. Payne, Deputy Clerk; Virginia Wright, Court Reporter; David Nissen, Asst. U.S. Attorney.

U.S.A. v. Witness Charles Joseph Kastigar, present.

Attorneys for Witness Oliver Wendell Holmes, Jr. appearing for Hugh Manes, present.

PROCEEDINGS:

Attorney Oliver W. Holmes appears for attorney Hugh Manes on behalf of witness Kastigar. Counsel for government states said witness has refused to answer questions before the grand jury.

Richard Franks, Court Reporter is called, sworn and reads questions and answers propounded to the witness. Court orders witness to answer the questions. Witness refuses to answer questions.

Court finds witness in contempt of Court and orders witness committed to the custody of the Attorney General until the questions are answered or until the Grand Jury is discharged.

Counsel for witness moves for stay of execution. Government states opposition and objections to stay of execution. Counsel argue.

Court grants stay of execution until 12 noon on February 16, 1971. Witness is ordered to surrender to the U.S. Marshal on said date and hour or a Bench Warrant for his arrest will issue. [7]

CIVIL DOCKET

United States District Court. 2649.

In the Matter of Michael Gorean Stewart. Application for Immunity.

2/12/71, 16501 (rcpt); $5.00, 2/17/71. [20]

2/4/71 Fld Application for Immunity & an ord requiring Stewart to testify bef the grand jury. LODGED Ord (Unsigned) that Michael Gorean Stewart appear forthwith bef the grand jury.

2/9/71 Fld Respondent's Memo of Pts & Authors in Support of Objection to Issu of Ord Granting Immunity Under 18/6002, 6003.

2/4/71 In the matter of G/J testy of Michael Gorean Stewart:
Ct & cnsl confer, Govt mks applic for immunity of wits. Cnsl for wits states objects to applictn. Ct takes matter und submission & cont hrg to 2/11/71, 9 am. (EAC)

2/11/71 Hrg: Mot by U.S. for issuance of ord grantg immunity & compling wit to testify bef the G/J. Ct addresses cnsl re mot takn und submissn on 2/4/71. Ct rules on mot & ords wit to ans Q's propounded by G/J. Ct ords wits to proceed to G/J room forthwith, Fld ord compelling wit to testify & produce evid in regards to matter under inquiry G/J. (EAC)

2/11/71 Ct & cnsl confer. Govt states wit has refused to testify bef G/J. Ct reportr C.S.T. as to Q's propounded to wit. Ct ords wit to ans Q's-wits refuses to answer. Ct finds wits

in contempt of Ct & ord wit committd to custy of A/G until questions are ans. or until life of the G/J has expired. Cnsl moves Ct for stay of exec. Cnsl argue mot for stya. Ct. grants stay of exec to 12 noon, 2/16/71. Wit to surrender on or bef that date or B/W to be issd for his arrest. (EAC)

2/12/71 Fld Notc of Appeal as to wits Michael Gorean Stewart & issd cys to (EAC), US Atty, US Mars, P/O, wit & wits' cnsl, Oliver W. Holmes. Flg fee paid, cnsl retd.

2/16/71 Fld Ord (EAC) Staying Exec of Sent of Contempt until 12:noon 2/16/71.
Fld Affidavit of Elizabeth Spector.

2/22/71 Fld in Cases 2649-Misc & 2650-Misc. (Consolidated for Appeal) Designation of both defts Michael Gorean Stewart & Charles Joseph Kastigar's Designation of Record on Appeal purs to Rules 10(b) and 11 FRCP. I hereby attest and certify on February 26, 1971 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA
By /s/ ILLEGIBLE, Deputy [21]

CIVIL DOCKET

United States District Court. 2650.

In the Matter of Charles Joseph Kastigar. Application for Immunity.

2/12/71, 16502. §5.00 (.....) 2/17/71. [20]

2/4/71 Fld Application for Immunity & on ord for Charles Joseph Kastigar to testify bef the grand jury.

2/9/71 Fld Respondent's Memo of Pts & Authors in Support of Objection to Issu of Ord Granting Immunity under 18/6002, 6003.

2/4/71 Ct & cnsl confer. Govt mks applic for immunity of wits. Cnsl for wit states objects to applic. Ct. takes matter und submissn & cont hrg to 2/11/71, 9am. (EAC)

2/11/71 Hrg: Mot by U.S. for issuance of ord grantg immunity & compling wit to testify bef the G/J. Ct. addresses cnsl re mot tkn und submissn on 2/4/71. Ct rules on mot & ords wit to proceed to G/J room forthwith. Fld ord compelling wit to testify & produce evid in regards to matter und inquiry by G/J. (EAC)

2/11/71 Ct & cnsl confer; Govt states wit has refused to testify bef G/J. Ct reportr C.S.T. as to Q's propounded to wit. Ct ords wit to ans questions. Wit refuses to ans. Ct finds wit in contempt of Court & ord wit committed to custy of A/G until questions are ans or until G/J dischargd. Cnsl moves for stay of exec. Cnsl argue mot for stay. Ct grants

stay of exec to 12 noon, 2/16/71, wit to surr to U.S. Mars on that date or B/W issue for his arrest (EAC)

2/12/71 Fld Notc of Appeal as to Charles Joseph Kastigar & issd cys to (EAC), U.S. Atty. wit. wits cnsl Hugh R. Manes, U.S. Mars. Flg fee paid.

2/16/71 Fld Ord Staying Execution of Sent of Contempt to 12:00 noon 2/16/71 (EAC)
Fld Affidavit of Elizabeth Spector.

2/22/71 Fld in Cases 2649-Misc. & 2650-Misc. (Consolidated for Appeal) Designation of Record on Appeal on behalf of Michael Gorean Stewart and Charles Joseph Kastigar purs to Rules 10(b) and 11 FRCP.
I hearby attest and certify on Feb. 26, 1971 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA
By E. Ralph Derric, Deputy [21]

CIVIL DOCKET

United States District Court, 2650.

In the Matter of Charles Joseph Kastigar. Application for Immunity.

2/12/71, 16502, $500, (cpt) 2/14/71. [20]

Notice of Appeal.

United States District Cour, Central District of California.

In the Matter of Charles Joseph Kastigar. No. Misc. 2650-EAC.

Filed: Feb. 12, 10:59 AM '71.

NOTICE IS HEREBY GIVEN that CHARLES JOSEPH KASTIGAR hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order adjudging him to be in contempt of court entered in this action on the 11th day of February, 1971.

HUGH R. MANES
/s/ Hugh R. Manes

HUGH R. MANES
Attorney for Charles Joseph Kastigar
[16]

Notice of Appeal.

United States District Court, Central District of California.

In the Matter of Michael Gorean Stewart. No. Misc. 2649—EAC.

Filed: Feb. 12, 10:59 AM '71.

NOTICE IS HEREBY GIVEN that MICHAEL GOREAN STEWART hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order adjudging him to be in contempt of court entered in this action on the 11th day of February, 1971.

MARGOLIS, McTERNAN, SMITH, SCOPE & HERRING

By /s/ Oliver W. Holmes
OLIVER W. HOLMES
Attorney for Michael Gorean Stewart
[16]

United States Court of Appeals, for the Ninth Circuit.

Michael Gorean Stewart, Applicant, v. United States of America, Appellee. No. 71-1212.

Charles Joseph Kastigar, Appellant, v. United States of America, Appellee. No. 71-1213.

Filed: Mar. 10, 1971.

William B. Luck, Clerk

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, HUFSTEDLER and TRASK, Circuit Judges.

PER CURIAM:

Pursuant to Section 301(b) of the Organized Crime Control Act of 1970 (28 U.S.C. § 1826(b)), and particularly the time limitation therein, it is the decision of this court that the orders of the United States District Court, entered in each of the above cases on February 11, 1971, entered in each of the above cases on February 11, 1971, adjudging the respective appellants in civil contempt and ordering them confined, are AFFIRMED.

An opinion of this panel will be filed in due course. [87]

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Michael Gorean Stewart, *Appellant,* v. United States of America, *Appellee.* No. 71-1212.

Charles Joseph Kastigar, *Appellant,* v. United States of America, *Appellee.* No. 71-1213.

[March 29, 1971].

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, HUFSTEDLER and TRASK, Circuit Judges.

PER CURIAM:

This is an appeal from an order of the district court adjudging the appellants, Michael Stewart and Charles Kastigar, to be in civil contempt and ordering them confined. The order was entered pursuant to Section 301(a) of the Organized Crime Control Act of 1970, 28 U.S.C. § 1826, when appellants refused to answer questions before a grand jury after having been granted immunity under Section 201(a) of that Act. 18 U.S.C. § 6002. Because the statute pursuant to which this appeal was taken requires that the appeal be disposed of not later than thirty days from its filing, the unpublished order affirming the judgment of the district court was entered and filed on March 10, 1971, with the notation that this opinion of the panel was to follow.

Appellants' difficulties stem from the fact that each of them refused to answer questions put to him by the federal grand jury after an order granting immunity

under 18 U.S.C. § 6001 *et seq.* had been obtained for each. They claim the shelter of the Fifth [1] Amendment privilege against self-incrimination. They also assert that the summary procedure provided by 28 U.S.C. § 1826 denies them due process of law.

SELF-INCRIMINATION

Appellants' argue that the immunity provision of the Act[1] affords only a "use immunity." That is, that the answers may be compelled if there is immunity only from federal and state *use* of such testimony in connection with a criminal prosecution against the person testifying. This, they urge, does not satisfy the requirements of the Fifth Amendment or the cases interpreting it, particularly *Counselman v. Hitchcock,* 142 U.S. 547 (1892). Appellants insist that the Constitution requires that for a statute granting immunity to be valid it must afford complete and absolute immunity provided by the Fifth Amendment.[2]

This is accomplished, they assert, only where the witness is accorded "transactional immunity" under the appropriate statute. *Cf. Ullman v. United States,* 350

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[1]Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 6002, provides as follows:

"[T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; *but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness* in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

[2]"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Although these cases arise in the context of a federal immunity statute, it seems clear that the validity of a state immunity statute is measured by the same yardstick. *See Malloy v. Hogan,* 378 U.S. 1 (1964).

U.S. 422 (1956); *Brown v. Walker,* 161 U.S. 591 (1896).[3]

There appears to be no question but that a "transaction" statute affords the protection that the Fifth Amendment requires. Here [2] we examine a different statute to determine whether it also may be constitutional. We find that it is.

No case has been cited in which the Supreme Court has held that *only* a transaction statute will suffice, and we have found none. On the contrary, it appears that *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964), has decided the issue here both with respect to the scope of *Counselman* and also with respect to the extent of the requirements of the Fifth Amendment—ast least as the latter apply here.

Murphy was decided on the same day as *Malloy v. Hogan,* 378 U.S. 1 (1964). *Malloy* held that the Fourteenth Amendment prohibits state infringement of the privilege against self-incrimination just as the Fifth Amendment prohibits the federal government from denying the privilege. *Murphy* decided a related question: Whether one jurisdiction within the federal structure could compel a witness to whom it had granted immunity to give testimony which might then be used to convict him of a crime against another jurisdiction. In the case under consideration here, of course, the

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[3]A typical "transaction" statute is the one held sufficient in *Ullman.* It provides in pertinent part:

> "But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing against self-incrimination, to testify or produce evidence. Nor shall testimony so compelled be used as evidence in any criminal proceeding concerning which he is compelled, after having claimed his privilege . . . against him in any court." 350 U.S. at 424.

issue is one of compulsion to testify before a federal grand jury investigating possible violations of the laws of the United States, after having received immunity under the federal statute.[4] In *Murphy* the Court considered *Counselman* and then stated the rule to be:

> "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. at 79.

The Court added this significant footnote:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S. at 79 n.18.

It seems apparent from this footnote that the Court does not believe that the immunized testimony must bar all *prosecution* for the "transaction" about which he testified. Rather, the Court makes [3] clear that any evidence used must be free from all taint of compulsion. There must be an "independent legitimate source" for it other than from that evidence produced by the witness under compulsion and its fruits.[5]

---

[4] *Supra*, footnote 1.

[5] Such a construction is consistent with the rule governing the admissibility of evidence charged to have been obtained by illegal search and seizure in violation of the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471 (1963).

Mr. Justice White in his concurring opinion voiced the views that are urged by the appellee and those views would sustain the statute under attack here. *Murphy, supra,* 378 U.S. at 100-07. That a prosecution need not be foreclosed which arises out of any "transaction" to which the witness alludes, is inherent in his statement:

> "In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation . . . . It is precisely this possibility of a prosecution based on untainted evidence that we must recognize." 378 U.S. at 106.

The statute now under question appears clearly within the protective limitations of the Fifth Amendment as construed by *Murphy*. It proscribes the use of the testimony "or other information" compelled, together with "any information directly or indirectly derived from such testimony or other information." *See also Zicarelli v. New Jersey State Commission of Investigation,* 55 N.J. 249 (1970); 261 A.2d 129, 137-40 (1970), *Prob. juris. noted,* 39 U.S. L.W. 3375 (U.S. March 2, 1971) (No. 91).

DUE PROCESS

Appellants, in addition, urge that 18 U.S.C. § 6002-03 and 28 U.S.C. § 1826, impose a summary procedure upon them which denies them fundamental notice and a fair hearing required by the due process requirements of the Fifth Amendment.

The appellants were not parties to any judicial proceeding. They were witnesses called upon to give evi-

dence, if any they had, of possible violations of the laws of the United States. They were appearing under subpoena. The record discloses that their counsel was available to advise them. Their contentiion, therefore, based upon due process is without merit. *United States v. Weinberg,* F.2d (9th Cir. Jan. 18, 1971).

The judgment of the district court is affirmed. [4]

Supreme Court of the United States, Office of the Clerk, Washington, D.C. 20543.

E. ROBERT SEAVER
Clerk of the Court

May 17, 1971

Hugh R. Manes, Esq.
3440 Wilshire Boulevard
Suite 608
Los Angeles, California 90010

RE: KASTIGAR v. UNITED STATES
No. 1562, O.T. 1970

Dear Mr. Manes:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed is a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

E. ROBERT SEAVER, Clerk
By /s/ Helen K. Loughran
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL
Enclosures

cc: Margolis, McTernan, Smith,
Scope & Herring
3325 Wilshire Boulevard
Suite 901
Los Angeles, Calif. 90010

Supreme Court of the United States

No. 1562 ----, *October Term, 19* 70

Charles Joseph Kastigar and Michael Gorean Stewart,

Petitioners,

v.

United States

ORDER ALLOWING CERTIORARI. Filed May 17 ---------- , 19 71.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted.

May 17, 1971

IN THE

Supreme Court of the United States

FILED
APR 8 1971
JOHN SEAVER, CLERK

October Term, 1970

No. ~~1502~~ 70-117

CHARLES JOSEPH KASTIGAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MICHAEL GOREAN STEWART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Consolidated Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

HUGH R. MANES,
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IN THE

Supreme Court of the United States

October Term, 1970

No. .....

CHARLES JOSEPH KASTIGAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MICHAEL GOREAN STEWART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Consolidated Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Charles Joseph Kastigar and Michael Gorean Stewart respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this (consolidated) proceeding on March 10, 1971.

Opinion Below.

The appeal was expedited to judgment within thirty (30) days after filing of notice of appeal pursuant to 28 U.S.C. §1826(b).

A written opinion was issue on March 29, 1971. A copy thereof is attached hereto as Appendix 1.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 10, 1971. No petition for rehearing was filed. This petition for certiorari is filed within thirty (30) days of the date of entry of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented.

Whether under a grant of use-immunity conferred under a federal use-immunity statute, a witness can be compelled to testify before a federal grand jury over his claim of the Fifth Amendment privilege against self-incrimination when the immunity so conferred leaves the witness subject to prosecution for the transaction concerning which he has been required to testify.

Constitutional and Statutory Provisions Involved.

Fifth Amendment, United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. . . ."

§§202-203, Organized Crime Control Act of 1970; United States Code, Title 18:

> "§6002. *Immunity Generally.*
>
> "Whenever a witness refused, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> "(1) a court or grand jury of the United States,
>
> "(2) an agency of the United States, or
>
> "(3) either House of Congress, a joint com-

mittee of the two Houses, or a committee or a sub-committee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

"§6003. *Court and grand jury proceedings*

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

Statement of the Case.

Petitioners were each summoned to appear and testify before a federal grand jury in Los Angeles, California on February 4, 1971.[1]

Before being examined, petitioners were requested to and did appear, with counsel, in the United States District Court for the Central District of California, Hon. Avery E. Crary, Judge Presiding, whereupon the Assistant United States Attorney presented a written application for an order compelling petitioners to testify under a grant of use-immunity pursuant to Title 18, United States Code, Sections 6002-6003. Petitioners, by their counsel, opposed the application on grounds, *inter alia,* that the statutes did not provide immunity coextensive with the protection afforded by the Fifth Amendment and therefore the proposed order would violate that constitutional provision.

The court continued the cause to February 11, 1971, and ordered petitioners to reappear at that time.

On February 11, the District Court made and entered a written order which noted that immunity under

---

[1]Petitioner Kastigar had previously appeared on the same transaction before the grand jury on September 9, 1970, pursuant to subpoena, at which time he declined to testify on grounds of self-incrimination. No immunity was offered at that time, the statute at bar not yet having become operative, and he was excused.

Title 18 U.S.C. §§6002 and 6003 had been conferred on each petitioner, and which ordered each petitioner to "appear forthwith before the grand jury and testify or produce evidence with respect to all matters under inquiry by the grand jury."

A copy of said order as to petitioner Kastigar is attached hereto as Appendix 2, and as to petitioner Stewart, as Appendix 3, and by reference is incorporated herein and made a part hereof.

Petitioners were then directed by the court to, and did each appear before the grand jury. Petitioner Kastigar was asked the following question:

> "Q. [By the Assistant U.S. Attorney]: Mr. Kastigar, as we told you before, the grand jury has received a great deal of information concerning a situation in which you had orthodontic braces placed on your teeth just prior to reporting for military induction and had them removed just after a word by a Dr. Bernard Bender, with offices at 8328 DeSoto in Canoga Park.
>
> "Would you tell us, please, how that came about?"

To which question petitioner Kastigar answered as follows:

> "I'm sorry, I decline to say anything about that on the basis that my answer may tend to incriminate me and on the advice of counsel."

In response to another question, petitioner Kastigar stated he would continue invoking the Fifth Amendment privilege against self-incrimination notwithstanding the court's order.

Petitioner Stewart was asked the following question before the grand jury:

> "Q. [By Assistant U.S. Attorney]: Would you please tell us how it came about that you went to Dr. Bender for the so-called dental services which I described."

To which Stewart replied:

> "Okay, on that I will have to respectfully decline to answer on the ground that it may tend to incriminate me."

Petitioner Stewart likewise indicated that he would invoke the Fifth Amendment privilege in response to all further questions.

Thereafter, both petitioners appeared as ordered before said District Court. The grand jury reporter read the afore-described responses of each petitioner. The court then ordered petitioners to answer said question on pain of imprisonment for civil contempt. Each petitioner again refused upon a claim of the privilege against self-incrimination.

The court thereupon adjudged each petitioner to be in contempt, and ordered them into the custody of the Attorney until the questions were answered or during the life of the grand jury.

But upon petitioners' request, that order was stayed until noon, February 16, 1971.

On February 12, 1971, petitioners each filed Notice of Appeal from said orders, and a motion for stay of execution pending disposition thereof on appeal.

On February 16, 1971, the Court of Appeals for the Ninth Circuit extended the stay pending disposition of petitioners' said motion; and on February 19, 1971,

further extended the stay pending disposition of the appeal in an order which also consolidated petitioners' respective appeals, directed that the appeal be expedited under 18 U.S.C. §1826(b), and provided a briefing and argument schedule which allowed petitioners six (6) days to file their opening brief.

A copy of said Order of the Court of Appeals dated February 19, 1971, is attached hereto as Appendix 4.

The appeal was argued on March 10, 1971;[2] and later that day, the Court of Appeals rendered its judgment affirming the orders of the District Court adjudging petitioners in civil contempt and ordering them confined.

A copy of said judgment of the Court of Appeals is attached hereto as Appendix 5.

---

[2]Counsel for petitioners was permitted a total of only fifteen minutes in which to present his argument.

REASONS FOR GRANTING CERTIORARI.

1. The Judgment of the Courts Below Is in Direct Conflict With This Court's Opinion in Counselman v. Hitchcock, 142 U.S. 547 (1892).

In *Counselman v. Hitchcock,* 142 U.S. 547, at pages 585-586, this Court said:

> "No statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment to be valid *must afford absolute immunity against future prosecution for the offense to which it relates.*"

That pronouncement, expressed in the context of a federal use-immunity statute which this Court found violative of the Fifth Amendment, has been accepted by Congress and the courts as a viable constitutional principle for nearly eighty years.

Shortly after *Counselman* was decided, Congress amended the immunity statute in that case to provide transactional immunity. The latter statute was sustained in *Brown v. Walker,* 161 U.S. 591 (1896); and thereafter, every federal immunity statute sustained by the Court conferred absolute immunity. (See: *Ullman v. United States,* 350 U.S. 422 (1956); *cf., Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965).)

Even after the "use and fruits" formulation of *Murphy v. Waterfront Commission of New York,* 378 U.S. 52 (1964), which apparently provided the ration-

ale for Sections 6002 and 6003,[3] this Court unanimously reaffirmed *Counselman's* requirement that a federal immunity must afford "absolute immunity against future prosecution for the offense to which the question relates." (*Albertson v. S.C.A.B., supra,* 382 U.S. at p. 80; see also: *Gardner v. Broderick,* 392 U.S. 273, 276 (1968).)

Moreover, the orders of the courts below conflict directly with those lines of decisions, beginning with *Counselman, supra,* 142 U.S. at p. 585, holding that statutory immunity is invalid unless co-extensive "in scope and effect" with the immunity afforded by the Fifth Amendment. (*Murphy v. Waterfront Commission of New York, supra,* 378 U.S. at p. 78.)

It is apparent that the use-immunity provided by Section 6002, 18 U.S.C., far from extending the same protection as the Fifth Amendment, equips the prosecution with a sweeping discovery device denied to the accused by the Jencks Statute (18 U.S.C. §3500), by the limitations of Rule 16 of the Federal Rules of Criminal Procedure, as construed and applied, and by the rarely unveiled secrecy which enshrouds grand jury proceedings and transcripts thereof. (See: *United States v. Procter & Gamble Co.,* 356 U.S. 677, 683 (1958); *Pittsburgh Plate & Glass Co. v. United States,* 360 U.S. 395, 400 (1959); *cf., Dennis v. United States,* 384 U.S. 855, 872 (1966).)

---

[3]It is evident from the legislative history of this statute that Congress intended to authorize only "use" rather than "transactional" immunity. (U.S. Code Cong. & Adm. News, 91st Cong., 2d Sess., No. 12, Nov. 20, 1970, at p. 4706.) Thus, the Committee's report on the effect and scope of this immunity statute explains that it—

> ". . . will afford 'use' immunity rather than 'transaction' immunity when a witness before a . . . grand jury . . . asserts his privilege against self-incrimination."

Additionally, Sections 6002 and 6003 enable the government to determine from the lips of a prospective defendant the weaknesses of his defenses—for example, whether in a criminal prosecution he is in a position to testify in his own defense; and if he is, by pinning the accused to testimony which, howeve innocently mistaken, he can change only at the risk of a subsequent perjury prosecution.

The immunity statute at bar permits the prosecution to learn from compelled testimony how to assemble diverse pieces of independent evidence already in its possession against an accused whose connection thereto had previously gone unnoticed or was not understood.

Finally, use-immunity statutes such as that at bar afford government investigators with virtually undetectable leads to independent witnesses and provide the mechanism for acquiring information which can be used to "refresh" an independent witness's recollection.

The Fifth Amendment protects such prospective defendants by affording the witness total protection against such use of his compelled testimony. So does statutory transaction immunity.

But "use-immunity" does not and cannot have the same scope and effect provided by the self-incrimination clause of the Fifth Amendment. Therefore the judgments of the courts below, resting as they do on a contrary view of that constitutional provision, appear to be in utter conflict with the decisions of this Court.

2. The Decisions of the Courts Below Raise Constitutional Questions of Far-Reaching Importance.

In *Piccirillo v. State of New York*, No. 97, ... U.S. ....., 27 L. Ed. 2d 596 (Jan. 25, 1971) (writ dismissed as improvidently granted) this Court deemed substantially the same question presented here to be of "far-reaching importance."

Since then, this Court has agreed to review two cases involving state "use-immunity" statutes which present essentially the same issues as those brought by *Piccirillo, supra,* and by petitioners, namely: *Sarno v. Illinois Crime Investigating Committee,* No. 565, 39 LW 3375 (March 2, 1971) and *Zicarelli v. New Jersey State Commission, No. 91,* 39 LW 3375 (March 2, 1971).

In *Zicarelli, supra,* two of the questions on which probable jurisdiction was noted, ask:

> (1) Whether a state immunity statute which merely prevents the subsequent use of a witness's testimony and evidence derived therefrom is sufficient to supplant the Fifth Amendment's privilege against self-incrimination; and
>
> (2) Whether *Counselman v. Hitchcock,* 142 U.S. 547 (1892), which stated that absolute immunity against further prosecution is required before the Fifth Amendment may be supplanted, is still the law of the land.

The federal immunity statute involved here, 18 U.S.C. §§6002-6003, is a recent enactment, and represents the first attempt by Congress since *Counselman* to consciously revert to use-immunity. Congress appears to have done so by reading the "use and fruits" language of *Murphy, supra,* as overturning the absolute immunity requirement of *Counselman* and post-*Murphy* decisions.

On the other hand, the "use and fruits" rationale of *Murphy* was invoked "to accommodate the interests of the state and federal governments in investigating and prosecuting crime" (378 U.S. at p. 79). No problem of such accommodation is here involved. Even if it were, this case presents to this Court the constitutionality in any context of a federal use-immunity statute for the first time since *Counselman*.

This seems to be the first federal case arising under §§6002 and 6003 to have reached this Court. It appears to be an appropriate vehicle for clarifying whether the constitutional standards of *Counselman*, or those applied by *Murphy* in a federal-state conflict situation should apply to a federal use-immunity where, as here, "only [the federal] government is involved," and hence, "the danger of prosecution [is] more imminent. . . ." (Concurring opinion of Mr. Justice White in *Murphy v. Waterfront Commission, etc., supra*, 378 U.S. at p. 98.)

3. The Decision of the Court of Appeals Below Is in Conflict With a Decision in Another Circuit.

In *The Matter of the Grand Jury Testimony of Joanne Kinoy*, No. M-11-188 (D.C.S.D.N.Y., decided 1/29/71), the Hon. Constance Baker Motley, D.J., in a memorandum opinion [not yet reported] which relied heavily on *Counselman v. Hitchcock, supra*, and distinguished *Murphy*, denied the government's application for an order compelling Miss Kinoy to answer questions before a federal grand jury under the grant of immunity conferred by §§6002 and 6003, upon the ground that the use immunity offered by the statute at bar was not co-extensive with that afforded by the Fifth Amendment, and hence offended that provision.

The government did not appeal; and so far as petitioners can determine the *Kinoy* opinion is the only judicial decision other than that of the courts below, which has passed on the constitutionality of 18 U.S.C. §§6002 and 6003.

Since petitioners, in their reply brief and at oral argument, expressly called the *Kinoy* opinion to the attention of the Court of Appeals for the Ninth Circuit, it follows from the judgment at bar that the holding and reasoning of *Kinoy* were rejected by the Ninth Circuit.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

HUGH R. MANES,

Attorney for Petitioner Kastigar.

MARGOLIS, MCTERNAN, SMITH, SCOPE & HERRING,

By HUGH R. MANES,

Attorneys for Petitioner Stewart.

APPENDIX 1.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Michael Gorean Stewart, Appellant, v. United States of America, Appellee. No. 71-1212

Charles Joseph Kastigar, Appellant, v. United States of America, Appellee. No. 71-1213

[March 29, 1971]

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, HUFSTEDLER and TRASK, Circuit Judges.

PER CURIAM:

This is an appeal from an order of the district court adjudging the appellants, Michael Stewart and Charles Kastigar, to be in civil contempt and ordering them confined. The order was entered pursuant to Section 301 (a) of the Organized Crime Control Act of 1970, 28 U.S.C. § 1826, when appellants refused to answer questions before a grand jury after having been granted immunity under Section 201(a) of that Act. 18 U.S.C. § 6002. Because the statute pursuant to which this appeal was taken requires that the appeal be disposed of not later than thirty days from its filing, the unpublished order affirming the judgment of the district court was entered and filed on March 10, 1971, with the notation that this opinion of the panel was to follow.

Appellants' difficulties stem from the fact that each of them refused to answer questions put to him by the

federal grand jury after an order granting immunity under 18 U.S.C. § 6001 *et seq.* had been obtained for each. They claim shelter of the Fifth Amendment privilege against self-incrimination. They also assert that the summary procedure provided by 28 U.S.C. § 1826 denies them due process of law.

SELF-INCRIMINATION

Appellants' argue that the immunity provision of the Act[1] affords only a "use immunity." That is, that the answers may be compelled if there is immunity only from federal and state *use* of such testimony in connection with a criminal prosecution against the person testifying. This, they urge, does not satisfy the requirements of the Fifth Amendment or the cases interpreting it, particularly *Counselman v. Hitchcock,* 142 U.S. 547 (1892). Appellants insist that the Constitution requires that for a statute granting immunity to be valid it must afford complete and absolute immunity co-extensive with the immunity provided by the Fifth Amendment.[2]

---

[1]Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. § 6002, provides as follows:

> "[T]he witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; *but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness* in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

[2]"No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Although these cases arise in the context of a federal immunity statute, it seems clear that the validity of a state immunity statute is measured by the same yardstick. *See Malloy v. Hogan,* 378 U.S. 1 (1964).

This is accomplished, they assert, only where the witness is accorded "transactional immunity" under the appropriate statute. *Cf. Ullman v. United States,* 350 U.S. 422 (1956); *Brown v. Walker,* 161 U.S. 591 (1896).[3]

There appears to be no question but that a "transaction" statute affords the protection that the Fifth Amendment requires. Here we examine a different statute to determine whether it also may be constitutional. We find that it is.

No case has been cited in which the Supreme Court has held that *only* a transaction statute will suffice, and we have found none. On the contrary, it appears that *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964), has decided the issue here both with respect to the scope of *Counselman* and also with respect to the extent of the requirements of the Fifth Amendment—at least as the latter apply here.

Murphy was decided on the same day as *Malloy v. Hogan,* 378 U.S. 1 (1964). *Malloy* held that the Fourteenth Amendment prohibits state infringement of the privilege against self-incrimination just as the Fifth Amendment prohibits the federal government from denying the privilege. *Murphy* decided a related question: Whether one jurisdiction within the federal structure

---

[3]A typical "transaction" statute is the one held sufficient in *Ullman.* It provides in pertinent part:

> "But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction matter, or thing against self-incrimination, to testify or produce evidence. Nor shall testimony so compelled be used as evidence in any criminal proceeding concerning which he is compelled, after having claimed his priviledge . . . against him in any court." 350 U.S. at 424.

could compel a witness to whom it had granted immunity to give testimony which might then be used to convict him of a crime against another jurisdiction. In the case under consideration here, of course, the issue is one of compulsion to testify before a federal grand jury investigating possible violations of the laws of the United States, after having received immunity under the federal statute.[4] In *Murphy* the Court considered *Counselman* and then stated the rule to be:

> "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." 378 U.S. at 79.

The Court added this significant footnote:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S. at 79 n. 18.

It seems apparent from this footnote that the Court does not believe that the immunized testimony must bar all *prosecution* for the "transaction" about which he testified. Rather, the Court makes clear that any evidence used must be free from all taint of compulsion.

---

[4] *Supra*, footnote 1.

There must be an "independent legitimate source" for it other than from that evidence produced by the witness under compulsion and its fruits.[5]

Mr. Justice White in his concurring opinion voiced the views that are urged by the appellee and those views would sustain the statute under attack here. *Murphy, supra,* 378 U.S. at 100-07. That a prosecution need not be foreclosed which arises out of any "transaction" to which the witness alludes, is inherent in his statement:

> "In my view it is possible for a federal prosecution to be based on untained evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation . . . . It is precisely this possibility of a prosecution based on untainted evidence that we must recognize." 378 U.S. at 106.

The statute now under question appears clearly within the protective limitations of the Fifth Amendment as construed by *Murphy*. It proscribes the use of the testimony "or other information" compelled, together with "any information directly or indirectly derived from such testimony or other information." *See also Zicarelli v. New Jersey State Commission of Investigation,* 55 N.J. 249 (1970); 261 A.2d 129, 137-40 (1970), *Prob. juris. noted,* 39 U.S. L.W. 3375 (U.S. March 2, 1971) (No. 91).

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[5]Such a construction is consistent with the rule governing the admissibility of evidence charged to have been obtained by illegal search and seizure in violation of the Fourth Amendment. *Wong Sun v. United States,* 371 U.S. 471 (1963).

DUE PROCESS

Appellants, in addition, urge that 18 U.S.C. § 6002-03 and 28 U.S.C. § 1826, impose a summary procedure upon them which denies them fundamental notice and a fair hearing required by the due process requirements of the Fifth Amendment.

The appellants were not parties to any judicial proceeding. They were witnesses called upon to give evidence, if any they had, of possible violations of the laws of the United States. They were appearing under subpoena. The record discloses that their counsel was available to advise them. Their contention, therefore, based upon due process is without merit. *United States v. Weinberg*, ... F.2d .... (9th Cir. Jan. 18, 1971).

The judgment of the district court is affirmed.

APPENDIX 2.

Order.

United States District Court, Central District of California.

In the Matter of Charles Joseph Kastigar.

Filed: Feb. 11, 1971.

The United States of America, having made written and oral application for an order compelling Charles Joseph Kastigar to testify and produce evidence before a duly constituted grand jury of the Central District of California, pursuant to Title 18, United States Code, Sections 6002 and 6003, and

Charles Joseph Kastigar, on September 9, 1970, having declined to answer questions before the grand jury by claiming his privilege against self-incrimination, the grand jury being then engaged in an inquiry into alleged violations of laws of the United States; and

The application for immunity having been approved by the Attorney General of the United States and made by the United States Attorney in whose judgment the testimony sought is necessary to the public interest, it is

ORDERED that Charles Joseph Kastigar appear forthwith before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury.

DATED: Feb. 11, 1971.

/s/ E. Avery Crary
United States District Judge

APPENDIX 3.

Order.

United States District Court, Central District of California.

In the Matter of Michael Gorean Stewart.

Filed: Feb. 11, 1971.

The United States of America, having made written and oral application for an order compelling Michael Gorean Stewart to testify and produce evidence before a duly constituted grand jury of the Central District of California, pursuant to Title 18, United States Code, Sections 6002 and 6003, and

Michael Gorean Stewart, being likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, the grand jury being engaged in an inquiry into alleged violations of laws of the United States; and

The application for immunity having been approved by the Attorney General of the United States and made by the United States Attorney in whose judgment the testimony sought is necessary to the public interest, it is

ORDERED that Michael Gorean Stewart appear forthwith before the grand jury and testify and produce evidence with respect to all matters under inquiry by the grand jury.

DATED: Feb. 11, 1971.

E. Avery Crary
United States District Judge

APPENDIX 4.

Order.

United States Court of Appeals, for the Ninth Circuit.

Michael Gorean Stewart, Appellant, v. United States of America, Appellee. No. 71-1212.

Charles Joseph Kastigar, Appellant, v. United States of America, Appellee. No. 71-1213.

Filed: Feb. 19, 1971.

Before: MERRILL and BROWNING, Circuit Judges.

The above appeals are consolidated. The orders appealed from are stayed pending disposition of the appeal. *Cf. United States v. Weinberg,* No. 26,903 (order filed December 23, 1970). The appeal is expedited pursuant to 18 U.S.C. § 1826(b). Appellants' opening briefs shall be filed by February 25, 1971, appellee's brief by March 4, and appellants' reply briefs by March 8. Oral argument will be heard during the week of March 8 at a time to be fixed by the Clerk of the Court.

CHARLES M. MERRILL
/s/ James D. Browning
Circuit Judges

February 19, 1971.

APPENDIX 5.

United States Court of Appeals for the Ninth Circuit.

Michael Gorean Stewart, Appellant, v. United States of America, Appellee. No. 71-1212.

Charles Joseph Kastigar, Appellant, v. United States of America, Appellee. No. 71-1213.

Filed: March 9, 1971.

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, HUFSTEDLER and TRASK, Circuit Judges

PER CURIAM:

Pursuant to Section 301(b) of the Organized Crime Control Act of 1970 (28 U.S.C. § 1826(b)), and particularly the time limitation therein, it is the decision of this court that the orders of the United States District Court, entered in each of the above cases on February 11, 1971, adjudging the respective appellees in civil contempt and ordering them confined, are AFFIRMED. An opinion of this panel will be filed in due course.

STEWART v. UNITED STATES—No. 71-1212

KASTIGAR v. UNITED STATES—No. 71-1213

MEMORANDUM TO CLERK LUCK:

All judges concerned having concurred in the within opinion (or order) the Clerk will please file.

/s/ Merrell W. Trask
United States Circuit Judge

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Supreme Court, U.S.
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70-117
~~No. 1562~~

In the Supreme Court of the United States

OCTOBER TERM, 1970

CHARLES JOSEPH KASTIGAR AND MICHAEL GOREAN STEWART, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1562

CHARLES JOSEPH KASTIGAR AND MICHAEL GOREAN STEWART, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners were adjudged in civil contempt by the United States District Court for the Central District of California for refusal to answer questions of a grand jury, despite the fact that each had been granted immunity under Section 201(a) of the Organized Crime Control Act of 1970, 84 Stat. 927, 18 U.S.C. 6002. Their claim is that the "use" immunity granted them under Section 6002 was not an adequate substitute for the privilege against self-incrimination and that full "transactional" immunity is required by the Fifth Amendment. The statute provides that "no testimony or other information compelled under the order

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(or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

The issue whether "use immunity" is sufficient to meet the requirements of the Fifth Amendment's privilege against self-incrimination is before this Court in *Zicarelli* v. *New Jersey Commission of Investigation*, No. 91, this Term, probable jurisdiction noted March 1, 1971. *Zicarelli* involves a New Jersey statute which limits the immunity given to use of "responsive evidence produced by [a witness], or evidence derived therefrom * * * to expose him to criminal prosecution or penalty or to a forfeiture of his estate * * *." N.J.S.A. 52:9M–17(b). Because of the importance of the federal statute involved in the instant case, which differs to some extent from the New Jersey statute, we believe that it would be desirable for the Court to have the instant case before it when it considers the "use immunity" issue. For that reason, we urge the Court to grant the petition in this case and set the case down for argument together with *Zicarelli* next Term.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 70-117

CHARLES JOSEPH KASTIGAR, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

MICHAEL GOREAN STEWART, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE ON BEHALF OF PETITIONERS

BENJAMIN DREYFUS,
341 Market Street,
San Francisco, California 94105,
Attorney for National Lawyers Guild Amicus Curiae.

DAVID E. PESONEN,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 70-117

CHARLES JOSEPH KASTIGAR,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

MICHAEL GOREAN STEWART,
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vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE ON BEHALF OF PETITIONERS

THE INTEREST OF AMICUS CURIAE

The National Lawyers Guild is a national bar association organized in 1937 and dedicated since its inception to defense of the Bill of Rights. This brief amicus curiae on behalf of petitioners reflects the

Guild's conviction that the compulsory testimony provisions in Title II of the Organized Crime Control Act of 1970 pose an historic threat to liberties embodied in the Fifth Amendment clause that "No person . . . shall be compelled in any criminal case to be a witness against himself."

ARGUMENT

I. THE IMMUNITY PROVISIONS IN TITLE II OF THE ORGANIZED CRIME CONTROL ACT OF 1970 DANGEROUSLY BLUR THE CONSTITUTIONAL SEPARATION OF POWERS.

A. The Legislative History Shows That Title II is Intended to Grant Unprecedented Arbitrary Powers to the Executive Branch.

The immunity provisions in Title II of the Organized Crime Control Act of 1970[1] headed the list of organized crime legislation sponsored by the Attorney General during the 91st Congress. Witness immunity was the first of the "new weapons and tools" requested by the Attorney General, on which President Nixon, in a special message to Congress, "relative to the fight against organized crime," urged Congress to act "swiftly and favorably."[2]

The President took special pains to "commend to the Congress for its consideration" the recommenda-

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[1]Pub. L. 91-452, Title II, Oct. 15, 1970, 84 Stat. 926, 18 U.S.C. §§ 6001 et seq.

[2]Message from the President of the United States, "Relative to the Fight Against Organized Crime," April 23, 1969. Reprinted in *Hearings* on S. 30 and other measures, Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969), at pp. 444 et seq., p. 448.

tions on witness immunity of the National Commission on Reform of Federal Criminal Laws. And the Commission's draft immunity bill was incorporated by Congress into the Organized Crime Control Act without significant modification.[3]

The Commission, however, relied entirely on the analysis of immunity prepared by its consultant, Professor Robert G. Dixon, Jr. A close review of the legislative history of Title II reveals that Congress was persuaded to its adoption under the strenuous lobbying of the Department of Justice, which based its position on Professor Dixon's analysis.[4]

Professor Dixon's contention, hammered home by the Justice Department witnesses, is that the scope of

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[3]The Commission's draft bill is set forth in Hearings on S. 30, *supra*, n. 2, at pp. 289-90.

[4]The Commission's report is contained in identical letters dated March 17, 1969, to President Nixon and House Speaker McCormack.

Commission Document No. 33, prepared by Professor Dixon, is appended to each letter and constitutes the bulk of the Commission's material submitted to the President and to Congress.

The Commission's letter report to the House Speaker is set forth in *Hearings* on H. R. 11157 and 12041, before Subcomm. No. 3 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., Ser. 14, pp. 36-38. (1969)

The letter report to the President is set forth in *Hearings* on S. 30, at pp. 287-9, *supra*, n. 2.

The complete text of Commission Document No. 33 is set forth in the *Hearings* on S. 30, pp. 290-321.

In addition, Professor Dixon testified extensively in support of the Commission's draft bill on immunity before the Judiciary Committees of both houses: *Hearings* on H. R. 11157, at pp. 55 et seq.; *Hearings* on S. 30 at pp. 279 et seq.

The testimony of Attorney General Mitchell and other representatives of the Justice Department appears in the House Judiciary Committee hearings referred to, beginning at p. 39, and in the Senate Judiciary Committee hearings referred to, beginning at pp. 107 and 388. The written comments of the Department of Justice appear in the Senate hearings, beginning at p. 369.

statutory immunity conferred on a witness who invokes his Fifth Amendment privilege—as a quid pro quo for compelling testimony on pain of contempt—need be no broader than the "immunity" judicially created in non-statutory situations. The legislative history reflects only shallow inquiry by Congress into the implications of Title II and perfunctory analysis of the authority mustered in support of the Dixon thesis.[5]

The purpose and effect of Title II, when coupled with the sanctions for recalcitrant witnesses in Title III of the Act, are to confer unprecedented power on the Attorney General to deprive citizens of their right to remain silent. The statute contemplates no judicially administrable standards for exercise of this pernicious authority. Indeed, Professor Dixon argues that the nature of the power itself precludes a judicial role.[6]

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[5]See H. R. Rep. No. 91-1549, 91st Cong., 1st Sess. (1970), set out in *U.S. Code Cong. & Ad. News*, pp. 4705, 4715.

[6]"* * * Grants of immunity * * * are the product of a calculation by the immunity granting agency that its need for the information overrides the public interest in prosecuting those witnesses whose conduct has made them possible defendants in a possible proceeding.

"This is a 'law enforcement bargain situation'—a naked policy judgment—in regard to which the courts have no legal standards for judgment * * *." *Hearings* on S. 30 at p. 294, *supra*, n. 2.

"Indeed," Professor Dixon continues, "a court or judge, once in the immunity picture, may naturally be disposed to find a 'meaningful' role by ballooning a petty, and even demeaning, procedural role into a pseudo-procedural substantive-oriented review of the public need for a particular grant in question. That this is a real possibility is intimated by some of the lines in the opinion of Judge J. Skelly Wright in *In re Bart* [304 F.2d 631 (D.C. Cir., 1962)], *supra*." *Hearings* on S. 30 at p. 301.

"By definition, a court, with no panoramic vision of total federal law enforcement planning and accomplishment, will lack the

Fundamentally Title II of the Organized Crime Control Act sanctions another exercise of broad executive powers, assumed by the present Attorney General in other contexts. These have been urged recently in the asserted inherent authority of the executive branch to override long established freedoms of the press under the vague rubric of "national security."[7] And the Justice Department equally seeks to disembowel the Fourth Amendment protection against unreasonable searches and seizures with the sprawling invention of an executive right to tap wires without a warrant in domestic "national security" cases.[8] Together, these measures reveal a menacing, and illegal, concentration of power in the Executive.

Unlike the sweeping powers sought by the Justice Department in the cited First and Fourth Amendment areas, however, the grant of executive power in

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needed perspective for an informed decision." *Hearings* on S. 30 at p. 312.

Professor Dixon concludes that participation of a federal district judge in the compulsory testimony proceedings under immunity statutes has been and should continue to be a "weak and paltry thing—ministerial, not discretionary in nature." *Hearings* on S. 30, at p. 316.

[7]The existence of this power was forcefully urged on this Court by the government in *New York Times Co. v. United States*, 39 U.S.L.W. 4879 (June 30, 1971).

[8]That the government ought to be free of judicial scrutiny in electronic surveillance and wiretapping of "domestic subversives" is urged on this Court in *United States v. United States District Court, et al.*, No. 71-1105 (6th Cir., filed April 8, 1971), *cert. granted*, 39 U.S.L.W. 3556 (June 21, 1971).

See also *United States v. Smith*, 321 F. Supp. 424 (C.D. Cal., 1971), petition for writ of mandamus pending in *United States v. United States District Court, et al.*, 9th Cir., No. 71-1378.

And see *United States v. United States District Court, et al.* (on petition for writ of mandamus to the District Court for the Northern District of California), 9th Cir., No. 71-1882, pending.

the Fifth Amendment context has been seduced from the Congress by the Justice Department and is now crystallized in statute.

If the statute is allowed to stand, it will be a repudiation of the fundamental meaning of the Fifth Amendment. As Mr. Justice Frankfurter said in the Court's opinion in *Ullmann v. United States,* 350 U.S. 422, 426 (1956), the privilege "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" And the Solicitor General, Erwin N. Griswold, in his famous series of addresses provoked by congressional abuses of the privilege during the McCarthy investigations, re-affirmed the privilege as an ancient shield between the citizen and the state:

> One of the functions of government, based on long experience, is at times to protect the citizen against the government. This function has been performed, to some extent, by the Fifth Amendment, although not always perfectly, and not always without some loss to legitimate government interests. While protecting the citizen against the government, the Fifth Amendment has been a firm reminder of the importance of the individual.
>
> * * * [T]he Fifth Amendment can serve as a constant reminder of the high standards set by the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest affirmations * * *[9]

[9]Griswold, "The Fifth Amendment Today," Harvard University Press, Cambridge, 1955, at p. 81.

B. Historical Experience With Immunity Statutes Affords No Assurance Against Abuse of Title II to Suppress Unpopular Political Ideas.

The Fifth Amendment privilege attracted wide public attention during the early 1950's as a result of flagrant abuses of investigatory powers by congressional committees. Title II of the Organized Crime Control Act of 1970 promises a renewal of those abuses, but it shifts the forum from the committee rooms of Congress to grand juries across the country. Two *sui generis* ingredients of the statute suggest this result.

(1) The Unlimited Subject Matter For Which Title II May Be Employed.

Before 1970 compulsory testimony statutes, with two exceptions, were restricted to offenses connected with economic regulation.[10] Since the object of investigation into such offenses was usually a corporate offender to which the privilege against self-incrimination did not extend, the potential for widespread abuse of immunity was slim.

In 1954 Congress was still uneasy over the concept of compulsory testimony. When it enacted the first such provision outside the area of economic regulation (18 U.S.C. § 3486(c)), it continued to limit the subject matter to which the statute applied. The con-

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[10] "Until recent years the United States Attorneys and the Department of Justice did not have immunity statutes supportive of their general criminal law enforcement function, apart from their role in enforcing the 'criminal kickers' attached to various economic regulation statutes." *Hearings* on S. 30, at p. 296; see also Appendix A, "Existing Immunity Statutes," at p. 319.

stitutionality of this section was upheld in *Ullmann v. United States,* 350 U.S. 422 (1956).[11]

Congress, however, threw caution to the winds in Title II by removing any such restrictions[12] and substituting the shapeless requirement that the compelled testimony need only be "in the public interest," if so asserted by a United States Attorney, with the approval of the Attorney General or certain of his subordinates. Significantly, "organized crime" is nowhere defined in the Act.

Thus until now the country has had no experience with compulsory testimony legislation which may be applied broadly to "deviations from prevalent beliefs, thoughts, opinions, associations, and utterances—the fields protected by the Fifth Amendment." Rogge, Compelling the Testimony of Political Deviants, 55 Mich. L. Rev. 375, 383 (1957).

But that Title II will be given such application is already suggested by the efforts of the present Attorney General to expand the permissible subjects of compulsory testimony beyond the scope envisioned by Congress in the immunity provisions of the Omnibus Crime Control and Safe Streets Act of 1968. (18

[11]The close control of subject matter by Congress in § 3486(c) was one of the factors relied upon by the court in *Ullmann* for upholding the section against attack on the grounds that it infringed upon state interests. 350 U.S. at 435-36. See also *In re Bart,* 304 F.2d 631 (D.C. Cir., 1962).

[12]Following the *Ullmann* decision Congress added transactional immunity provisions to the Narcotics Control Act in 1956 (18 U.S.C. § 1406), the Consumer Protection Act of 1968 (18 U.S.C. § 895), and the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2514, 2516). But these provisions continued the historic practice of specifying the offenses to which they were applicable.

U.S.C. §§ 2514, 2516.) *Carter v. United States,* 417 F. 2d 384 (9th Cir., 1969).

(2) The Prospective Immunity Provisions of Title II.

Title II contains unprecedented authorization for prospective compulsory testimony applications in grand jury, congressional, and administrative proceedings. Application by the United States attorney may be made without notice to the witness, if it appears that the witness "is likely to refuse to testify." This provision is framed in mandatory terms with respect to the powers of the district court to which application is made.

Freedoms of association and speech, as well as an interest in a zone of personal privacy, ordinarily immune from government intrusion, are related to the Fifth Amendment privilege, even though they may not be incorporated in it. (See e.g., *Ullmann v. United States, supra,* fn. 6, 350 U.S. at 430).

There can be no doubt that the omnipresent spectre of a federal district court order to testify or produce any evidence that a United States attorney believes "may be necessary to the public interest" will have the chilling effect of a deep freeze on the exercise of these personal rights by persons whose political views are deemed dangerous or distasteful to the government.[13]

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[13]Such prospective orders also run counter to the policies of Rule 24, Federal Rules of Civil Procedure, respecting intervention of right. Indeed, that Congress had such an illegitimate purpose in providing for prospective immunity is indicated by the express intent to overrule *In re McElrath,* 248 F.2d 612 *en banc* (1957). (See H. R. Rep. No. 91-1549, *supra,* 1970 *U.S. Code Cong. & Ad. News,* at p. 4719.)

II. TITLE II OF THE ORGANIZED CRIME CONTROL ACT IS FOUNDED ON A SERIOUS MISCONSTRUCTION OF THIS COURT'S RECENT DECISIONS EXPANDING THE PROTECTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

At the heart of the Dixon-Justice Department argument laid before Congress lies confusion between a constitutional remedy and a constitutional principle. The premise behind Title II is that decisions of this Court, forbidding use of evidence obtained directly or indirectly by illegal government coercion, establish a form of judicial immunity equivalent in all respects to the statutory immunity in Title II.

The fatal error in this proposition is that it distorts the settled constitutional requirement that statutory immunity must be "coextensive with the privilege," *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892); *Brown v. Walker*, 161 U.S. 591 (1896); *Glickstein v. United States*, 222 U.S. 139, 141 (1911); *Murphy v. Waterfront Commission*, 378 U.S. 52, 54 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964), into the proposition that formal immunity need only be coextensive with the judicial *remedy* for violation of the privilege.[14] The remedy and the privilege are not coextensive.

This fallacy derives from an erroneous reading of decisions by this court dealing with confessions

[14]The values served by the exclusionary rule of evidence, applied in cases of unlawful search and seizure and illegal confessions, of course go beyond affording a remedy to one whose constitutional rights have been violated. But remedial purposes are an important part of the rule's rationale. See *Mapp v. Ohio*, 367 U.S. 643, 652 (1961), overruling *Wolf v. State of Colorado*, 338 U.S. 25 (1949).

coerced by police misconduct, civil penalties imposed as a price for assertion of the privilege, and certain registration statutes.

The coerced confession cases are exemplified by *Miranda v. State of Arizona,* 384 U.S. 436 (1966), holding that when the interrogation practices set forth in that decision are not adhered to, there is a strong presumption of violation of the privilege against self-incrimination. If the state is unable to meet the "heavy burden" of that presumption, all custodial statements must be excluded from evidence used at trial.

The scope of exclusion—"immunity"—however, has been fixed since this Court's landmark Fourth Amendment decisions in *Boyd v. United States,* 116 U.S. 616 (1885), and *Weeks v. United States,* 232 U.S. 383 (1914). The applicability, not the scope of the remedy was the issue in *Miranda.* Thus only a disingenuous interpretation of *Miranda* supports Professor Dixon's suggestion that "Use restriction has emerged as the central theme of the Fifth Amendment, analogous to the case development under the Fourth Amendment."[15]

The proponents of use-immunity also seek comfort in a second group of cases, concerning the use of evidence coerced by threats of civil penalties, particularly *Garrity v. New Jersey,* 385 U.S. 493 (1967), *Spevack v. Klein,* 385 U.S. 511 (1967), and *Gardner v. Broderick,* 392 U.S. 273 (1968). *Garrity* bars use

[15]*Hearings* on S. 30, at p. 305, *supra,* n. 2.

in criminal prosecutions of testimony derived from "waiver" of the privilege under the threat of loss of employment. *Spevack* precludes disbarment of an attorney for having invoked his privilege in a noncriminal investigatory proceeding. And *Gardner* holds that a police officer may not constitutionally suffer the penalty of dismissal from employment merely for relying on his privilege during an official investigation.[16]

The essence of these decisions is that the privilege bars compulsion of testimony by threat of civil penalties. The issue—as in *Miranda* and related confession cases—concerns the circumstances in which testimonial evidence will be deemed to arise from the government's exercise of coercive power rather than the declarant's exercise "of free choice to speak out or remain silent." *Garrity v. New Jersey, supra,* 385 U.S. at p. 497.

Thirdly, the recent gambling tax and gun registration cases, *Marchetti v. United States,* 390 U.S. 39 (1968), *Grosso v. United States,* 390 U.S. 62 (1968), and *Haynes v. United States,* 390 U.S. 85 (1968), are said to reaffirm that "use-restriction is the essential requirement imposed by the Fifth Amendment and hence the proper test of a valid immunity statute."[17]

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[16]The Dixon analysis carefully minimizes Mr. Justice Douglas' statement for the court in *Stevens v. Marks,* 383 U.S. 236, 244-45, a case closely touching the issue raised in other civil penalty cases, that the court need not decide the scope of immunity required in civil penalty cases, and completely ignores Mr. Justice Harlan's intimation in his concurring opinion that the transactional immunity of *Counselman* is required. *Hearings* on S. 30 at p. 307, *supra,* n. 2.

[17]*Hearings* on S. 30 at p. 307, *supra,* n. 2.

The purpose of the statutes disapproved in those cases was "to coerce evidence from persons engaged in illegal activities for use in their prosecution." 390 U.S. at 74, Brennan, J., concurring. And Mr. Justice Harlan's opinion for the Court makes clear that voluntariness is the touchstone of the privilege against self-incrimination:

> We cannot agree that the constitutional privilege is meaningfully waived merely because those "inherently suspect of criminal activities" have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither. 390 U.S. at 52.

The thrust of the coerced confession, civil penalty, and registration cases is that the Fifth Amendment forbids testimonial compulsion. The means employed by this Court to enforce the prohibition must vary to meet the challenge of new and subtle forms of compulsion in widely divergent circumstances. But aside from the anomaly of conjuring a narrowing of the privilege out of these decisions which expand it, Congress committed a grave and illogical error when it accepted the Dixon thesis that the remedies judicially constructed to defend the privilege mark the limit to which Congress must go when it seeks to erase the privilege by statute.

III. THE PRIVILEGE AGAINST SELF-INCRIMINATION FORBIDS CONGRESS TO COMPEL TESTIMONY, REGARDLESS OF THE SCOPE OF IMMUNITY PROMISED THE WITNESS.

A. The Letter and Spirit of the Fifth Amendment Deny Congress the Power to Compel Testimony Over Objection of the Privilege Against Self-Incrimination.

Differences in the nature of testimonial evidence, as opposed to real evidence, have obscured the fundamental invalidity of all immunity legislation. The obscurity arises from the different ways in which a voluntary waiver is manifested.

The act of testifying voluntarily itself constitutes waiver of the privilege not to testify. The waiver is subjective. This characteristic helps to explain the exceptional safeguards against inadvertent waiver set forth in *Miranda*. The privilege differs in this important respect from the Fourth Amendment right to be free from unreasonable searches and seizures, where an affirmative act, such as consent to police entry, is necessary for a finding of waiver and the invasion of the constitutional privilege is an objective occurrence.

But of course the two rights are of equivalent constitutional stature, enjoy equivalent procedural protection, and may even coalesce in particular circumstances. *Boyd v. United States,* 116 U.S. 616, *supra.*

The flaw in traditional analysis of immunity statutes may be illustrated by an analogy to Fourth Amendment protections. If Congress attempted a search and seizure "immunity" statute—providing that the police could make unreasonable searches and seizures but would be barred from use of the seized

evidence (use-immunity) or from prosecuting for any transaction, matter or thing revealed by the search (transactional immunity)—would this Court uphold it on any theory?

It is inconceivable that the Court which found in the Bill of Rights the penumbral right of privacy affirmed in *Griswold v. Connecticut,* 381 U.S. 479 (1965) and which recently reminded law enforcement authorities that the Fourth Amendment "protects people" from invasions of their privacy, *Katz v. United States,* 389 U.S. 347, 351 (1967), would sanction warrantless breaking and entering private houses, free rummaging in private papers, unrestrained electronic surveillance of private conversations, unlimited police power to detain and frisk citizens on the street, and all of the other invasions of privacy of which zealous police are capable—so long as the victims enjoyed "immunity," regardless of its scope.

Yet this is precisely what immunity statutes do. Indeed, they go further. They permit prosecutors to probe into the innermost secrets of the witness, into his political opinions, his associations and indiscretions. They foster theft of his conscience itself by forcing him to inform on others.[18] These are the

[18]As Dalton Trumbo, himself a victim of the early Cold War inquisitions directed at heretical thought in the film industry, has recently written:

> In each historical crisis the informer has always sprung up as a bondservant of tyranny. Gibbon devotes pages to denunciation of "that reptilian tribe" as they corrupted Roman society and prepared the way for absolutism. The Reformation swarmed with them. Puritan New England, as it sank into despotism, gave them free rein. Every American slaveholder solicited informers among his slaves and found

"really ugly dangers which might transform our whole system of free government," against which Dean Griswold warned.[19]

The analogy to Fourth Amendment protections highlights the fact that no immunity, no matter how broad its scope, is coextensive with the right to remain silent. As Justice Blatchford said in *Counselman v. Hitchcock, supra,* 142 U.S. at 565:

> It would be quite another thing if the constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will should not be used against him. But a mere act of congress cannot amend the constitution even if it should ingraft thereon such a proviso.

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them, and rewarded them (for the mark of the informer is always his reward). They fed like lice upon the prostrate body of the French Revolution, and Napoleon freely acknowledged his indebtedness to them and to Fouché. As the Russian Revolution succumbed to dictatorship the informer throve because he was necessary to the suppression of human liberty. China was governed by informers until she rose up and threw them out, and the Hungarian people wrought their most horrible revenge upon the informer and his master, the secret police.

The more I think on it the more it appears to me that the curse upon the informer which characterizes all religions and all philosophies lies at the very heart of the social compact: that without it there can be no decent relationship anywhere for anybody: that informing as a crime is worse than murder or rape, since the murderer and the rapist harm only specific victims while the informer poisons and destroys the spiritual life of whole peoples. Trumbo, "Additional Dialogue," Evans & Co., New York, 1970.

[19]Griswold, *supra,* n. 9, at p. 75.

B. Clearly, the Use-Immunity of Title II is Inadequate to Supplant the Privilege.

The salient feature of Title II of the Organized Crime Control Act is not immunity but compulsion. Indeed, even if Professor Dixon is correct that this Court's decisions point to use-restriction as the judicial remedy, constitutionally required in compulsory testimony situations, it follows that the immunity provisions of Title II grant the witness nothing to which he is not already entitled. The immunity elements of the statute are a nullity. And only the provisions for compulsion by contempt in Title III constitute new matter.[20]

It follows that to label statutes such as those enacted in Title II as "immunity acts" is a misnomer. They are compulsory testimony provisions and nothing more. Their purpose is to put such a heavy price on exercise of the privilege that the witness will

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[20]This conclusion is buttressed by the Court's holding in *Adams v. Maryland*, 347 U.S. 179 (1954), involving an "automatic" use-immunity statute. (See also *United States v. Monia*, 317 U.S. 424 (1943).) Mr. Justice Black, writing for a unanimous Court in *Adams*, pointed out that the only effect of the "automatic" feature of the statute (conferring immunity even when the witness has not invoked his privilege), was to remove the requirement for prior invocation:

> "It is true that Adams did not attempt to escape answering these questions by claiming a constitutional privilege to refuse to incriminate himself. But no language of the Act requires such a claim in order for a witness to feel secure that his testimony will not be used to convict him of crime. *Indeed a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. Consequently, the construction of §3486 here urged would limit its protection to that already afforded by the Fifth Amendment with no effect whatever.* * * *" 347 U.S. at 181. Italics added.

relinquish it. He can hardly be said to waive it. And in exchange for his forced relinquishment, Congress grants the witness nothing more than this Court has said he is entitled to if a confession is beaten out of him by the police.

The inevitable conclusion (which will not escape those citizens who are most skeptical of the viability of our institutions) is that what the constitution says a policeman may not do by torture, unconscionable threats, or even inadvertence, Congress has said a United States Attorney may now do with a district court order in his hand.

CONCLUSION

Title II of the Organized Crime Control Act of 1970 invites the government to nullify by indirection constitutional rights which it could not touch directly. It is no hyperbole to say that sanctioning such procedures can only reduce fundamental safeguards to "impotent and lifeless formulas." *Weems v. United States,* 217 U.S. 349 (1910).

The Act announces Congress' belief that democratic institutions must be abandoned in perilous times. Near dictatorial powers are granted the executive, while the courts are reduced to a "paltry," "ministerial" role. And that provision of the Bill of Rights which Dean Griswold eloquently characterized as "a symbol of our moral striving, of our sense of the essential importance and dignity of the individual," is surrendered to the fleeting apprehensions of the state.

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficial. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding. *Olmstead v. United States,* 277 U.S. 438, 485 (1928), Brandeis, J., dissenting.

This Court, in its historic role as guardian of the constitution, should not hesitate to reverse petitioners' convictions and strike down Title II in its entirety—as violative at once of the constitutional cornerstone of separation of powers, and of the constitution's priceless Fifth Amendment.

Dated, San Francisco, California,
July 28, 1971.

Respectfully submitted,

BENJAMIN DREYFUS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-117

CHARLES JOSEPH KASTIGAR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MICHAEL GOREAN STEWART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF *AMICUS CURIAE*

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United States v. Monia, 317 U. S. 424 (1943) 17

United States v. Murdock, 284 U. S. 141 (1931 .....17, 20

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50 U.S.C., Section 783(f) 23

Other Authorities Cited

Beveridge, The Assault upon American Fundamentals, 45 Reports of American Bar Ass'n, 188, 216 (1920) 34

Griswold, The Fifth Amendment Today (Harvard University Press, 1962), p. 80 ..... 18, 30

H. Report No. 91-1549, United States Code Congressional and Administrative News, p. 4018 7

Rogge, "Compulsory Testimony Act," New York Law Journal, May 3, 1971, pp. 1, 4 9

8 Wigmore, Evidence, (McNaughton Rev. 1961), pp. 302 et seq. 25

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BRIEF OF *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Center for Constitutional Rights, Inc. (hereinafter referred to as the Center), a non-profit corporation duly

organized and existing under and by virtue of the laws of the State of New Jersey, was formed in August 1966 for the purpose, among others, of furnishing legal assistance when requested to do so to persons anywhere in the United States whose civil rights or civil liberties were jeopardized. Accordingly, its lawyers, both staff and advisory, have since its formation been steadily involved in civil and criminal litigation in numerous jurisdictions. Center attorneys have successfully represented clients before this Court[1] and many federal circuit[2] and district courts.[3]

Of particular relevance to the instant matter, Center attorneys represented the witness in *In The Matter Of The Grand Jury Testimony Of Joanne Kinoy,* 326 F. Supp. 407 (S. D. N. Y., 1971), a case involving precisely the same issues as is before the Court here. In *Kinoy,* the court held that, in failing to provide transactional immunity, 18 U.S.C. §§6002-3, the 1970 federal compulsory testimony act, violates the Fifth Amendment privileges against self-incrimination.[4]

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[1] E.g., *Powell* v. *McCormack,* 395 U.S. 486 (1969); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965).

[2] *Dellinger* v. *Mitchell,* No. 23,931 (D. C. Cir., 1971); *Soglin* v. *Kaufman,* 418 F. 2d 163 (7th Cir., 1969); *NSA* v. *Hershey,* 412 F. 2d 1103 (D. C. Cir., 1969).

[3] *Smith* v. *University of Tennessee,* 300 F. Supp. 777 (E. D. Tenn., 1969); *McSurely* v. *Ratliff,* 282 F. Supp. 848 (E. D. Ken., 1967).

[4] The government, respondent here, did not appeal *Kinoy,* although it was the first case testing the constitutionality of Sections 6002-3. (The act went into effect on December 15, 1970. See Title II, Organized Crime Control Act of 1970, Pub. L. 91-452, Section 260. The government applied to the district court for an order compelling Ms. Kinoy to testify on January 11, 1971. The application was denied on January 29.)

Center attorneys have continued to represent numerous persons compelled to appear before federal grand juries[5] and to consult with attorneys representing other grand jury witnesses.[5a] Our experience in the past several months has given us cause for much concern. We have witnessed the implementation of what appears to be a conscious and consistent policy by the respondent to employ the grand jury and grand jury process throughout the United States as an arm of the executive branch. Contrary to the historical and constitutional function of the grand jury as a body which would stand between the citizen and his government, acting to protect the former against the excesses of the latter, *cf. Wood* v. *Georgia*, 370 U. S. 375, 390 (1962), federal grand juries are now being employed to perform what is ordinarily the investigatory and crime detection role of the Federal Bureau of Investigation. So, for example, the United States Court of Appeals for the Seventh Circuit recently disapproved an investigation conducted under the aegis of a federal grand jury, an investigation which it found was in reality a "fishing expedition." See *In re Dionisio*, 39 L.W. 2561 (March 25, 1971). Misuse of the grand jury as an institution was also apparent in *Kinoy, supra*, where the United States Attorney admitted in a sworn affidavit that one of the reasons the witness' testimony was sought was "to determine the whereabouts of [a fugitive] so that she may be apprehended."

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[5] E.G., *In re Carol Vericker*, No. 71-1656 (2d Cir., 1971); *In re Elizabeth Begley*, No. 71-1708 (2d Cir.) (appeal pending).

[5a] E.G., *In the Matter Of Joques Egan*, No. 71-1088 (3d Cir., 1971) (*en banc*); *In re Carol Evans*, No. 71-1499 (D. C. Cir., 1971).

We believe that the statute in issue here, 18 U. S. C. §§6002-3, poses an appreciable threat of compounding this kind of distortion of the purpose and function of the grand jury; we believe such distortion poses a substantial threat to the civil liberties of all Americans. As attorneys and as citizens, we are therefore moved to present to this Court our view on the constitutionality of that provision.[6]

Statement of the Case

Petitioners were each summoned to appear and testify before a grand jury in Los Angeles, California, on February 4, 1971.

Before being examined, however, petitioners were requested to and did appear with counsel before the United States District Court for the Central District of California (Crary, J.). At that time the Assistant United States Attorney presented a written application for an order compelling petitioners to testify pursuant to Title II of the Organized Crime Control Act of 1970, Pub. L. 91-452; 84 Stat. 922.

That compulsory testimony provision, which is Title 18 United States Code §§6002-3, represents a marked departure from prior federal immunity statutes. The sharpest change is in the failure to maintain the standard of transactional immunity. Rather than providing immunity from prosecution for the transaction concerning which the witness is compelled to testify, Section 6002 provides only immunity from the direct or indirect use of that testi-

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[6] Both petitioners and respondent have consented to the filing of this brief *amicus curiae*. Their letters of consent are filed with the clerk of this Court.

mony, thus leaving prosecution for the transaction a very real possibility:

> §6602. Immunity generally
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[6a]

[6a] Compare 18 U.S.C. § 2514:

> § 2514. Immunity of witnesses
>
> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or

(*Footnote continued on following page*)

Of the three federal courts which have heretofore issued opinions on its constitutionality, two have concluded that in merely providing use immunity, the Act violates the Fifth Amendment privilege against self-incrimination. See *In re Korman,* No. 71-1328 (7th Cir., 1971), a unanimous decision handed down on May 20 of this year, and *In The Matter Of The Grand Jury Testimony Of Joanne Kinoy,* 326 F. Supp. 407 (S. D. N. Y., 1971). Only the Ninth Circuit Court of Appeals, whose judgment is reviewed here, has thought Section 6002 adequately pro-

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(*Footnote continued from preceding page*)

proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

tects Fifth Amendment interests. See *Stewart* v. *United States,* 440 F. 2d 954 (9th Cir., 1971).[7]

It was on the ground that Section 6002 failed to provide immunity coextensive with the privilege against self-incrimination that petitioners opposed the government's application in the district court below. When the application was approved, that same objection was the basis of petitioners' refusal to answer questions before the grand jury. They were thereafter adjudged in civil contempt for refusal to testify and committed to the custody of the Attorney for the life of the grand jury or until the questions were answered. The judgment of the district court was affirmed by the Court of Appeals on March 10, 1971. Certiorari was granted on May 17, 1971, 91 S. Ct. 1668, to review the judgment of the Court of Appeals.

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[7] Also unlike prior general federal immunity statutes, the 1970 Act allows for the conferring of immunity in the investigation of possible violation of *any* federal statutes. Prior acts authorized immunity only in investigations under certain enumerated federal statutes. See, e.g., 18 U.S.C. § 3486, 18 U.S.C. § 1406 and 18 U.S.C. §§ 2514, 2516.

Sections 6002-3 further depart from prior immunity provisions in authorizing the granting of immunity prospectively; i.e., even before the person subpoenaed has appeared before the grand jury. "This sets aside the result that obtained in *In re McElrath,* 248 F. 2d 612 (D. C. Cir., 1957)." H. Report No. 91-1549, *United States Code Congressional and Administrative News,* p. 4018. Compare also *United States* v. *DiMauro,* 441 F. 2d 428, 440-1 (8th Cir., 1971). The question of the constitutionality of such an immunity, under Article III, Section 2 and the Fifth Amendment, has not been raised by petitioners. (If the privilege against self-incrimination may not be pleaded in advance of appearance before the grand jury, it is difficult to see how an order compelling testimony over that privilege may be obtained at that time.)

Nor has there been raised before the Court in this case the issue whether in taking from the district court any and all judicial function and leaving the court a purely ministerial, "rubber stamp" role, the 1970 Act violates the principle of separation of powers.

ARGUMENT

A witness may not be compelled to testify before a federal grand jury over his claim of Fifth Amendment privilege against self-incrimination when the immunity offered by federal statute is merely immunity from use of the grand jury testimony which leaves the witness subject to prosecution for the transaction concerning which he would be required to testify.

We respectfully submit that the compulsory testimony statute, 18 U.S.C. §§6002-3, providing as it does mere immunity from the use of grand jury testimony in a subsequent prosecution of the witness rather than immunity from prosecution arising out of the transaction to which the testimony relates, violates the privilege against self-incrimination safeguarded by the Fifth Amendment. It offends the plain meaning of the amendment and cannot be reconciled with the authoritative decision of this Court in *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892) or with the values which the privilege against self-incrimination was intended to protect.

The unanimous decision in *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), is dispositive of the issue in this case and mandates the conclusion that the 1970 compulsory testimony provision is unconstitutional.

Counselman was the first case in which this Court passed upon the constitutional sufficiency of a federal statute which sought to compel testimony before a federal grand jury after a witness had refused to answer questions on the ground that the answers might tend to incriminate him. The occasion was a federal grand jury investigation into alleged violation of the Interstate Com-

merce Act of 1887, 24 Stat. 379. The witness Counselman, invoking the privilege against self-incrimination, refused to answer certain questions put to him and maintained his silence even after he was ordered by the district judge to testify pursuant to Rev. Stat. Section 860, 15 Stat. 37 (1868). He was thereupon deemed in contempt of court.

Section 860 commanded a witness to testify over his claim of privilege and provided as follows:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.[8]

In reviewing Counselman's contention that Section 860 was violative of the privilege against self-incrimination, Justice Blatchford declared for the Court that the privilege "is as broad as the mischief against which it seeks to guard," *supra* at 562, and that for a compulsory testimony act to comport with the Fifth Amendment it must be "co-extensive with the constitutional provision." *Id.* at 565.

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[8] The history of Section 860 and of 11 Stat. 155 (1857) and 12 Stat. 333 (1862), the federal compulsory testimony acts which preceded it, is detailed at length in Rogge, "Compulsory Testimony Act," New York Law Journal, May 3, 1971, pp. 1, 4.

The Court's conclusion as to what kind of immunity was required if a compulsory testimony act were to comport with the privilege was unequivocal:

> We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which it relates. *Id.* at 585-6.

Counselman's conviction was therefore reversed.

Despite the unmistakable clarity of the Court's conclusion, the Government has contended that the language in *Counselman* was really *dictum* not intended to be the holding of the case.[9] Such an argument ignores the analysis employed by this Court in overturning Counselman's conviction and the context in which the principle was announced.

The conclusion that a compulsory testimony statute satisfies the Fifth Amendment only if it provides transactional immunity was reached after a careful review of numerous cases that had considered the question. Signifi-

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[9] See, e.g., *In re Korman*, *supra*, Slip Op., pp. 3-7, and *In The Matter Of The Grand Jury Testimony Of Joanne Kinoy*, *supra* at 412-5. Both the Seventh Circuit and Judge Motley flatly rejected this argument.

cantly, the Court in *Counselman* adopted what had previously been the minority rule. It noted such cases as *State* v. *Quarles,* 13 Ark. 307 (1853); *Higdon* v. *Heard,* 14 Ga. 255 (1853); *Ex Parte Rowe,* 7 Cal. 184 (1857); *Wilkins* v. *Malone,* 14 Ind. 153 (1860); *People* v. *Kelly,* 24 N. Y. 74 (1861); and *La Fontaine* v. *Southern Underwriters,* 83 N. C. 132 (1880). All these cases supported the Government's position in *Counselman,* namely that a compulsory testimony statute need not provide transactional immunity for it to be co-extensive with the privilege. This Court, however, declined to follow those cases and instead adopted the principle adhered to in *Emery's Case,* 107 Mass. 172 (1871); *Cullen* v. *Commonwealth,* 24 Grat. 624 (1873); and *State* v. *Nowell,* 58 N. H. 314 (1878).

In the Massachusetts case, Emery invoked the privilege against self-incrimination and refused to answer questions propounded to him even after being ordered to respond on the basis of a statute which precluded any subsequent use of his testimony against him. Convicted of contempt, Emery brought his conviction before the state supreme court and that tribunal, referring to the privilege, concluded as follows:

> [N]o one can be required to forego an application to its protection, unless first secured from future liability, and exposure to be prejudiced, in any criminal proceeding against him, as fully and extensively as he would be served by availing himself of the privilege accorded by the Constitution. Under the interpretation already given, this cannot be accomplished so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined, or to which his testimony shall relate.

The court continued:

> Failing, then, to furnish to the persons to be examined an exemption equivalent to that contained in the constitution, or to remove the whole liability against which its provisions were intended to protect them, it fails to deprive them of the right to appeal to the privilege therein.[10]

Because the Massachusetts statute did not provide transactional immunity, Emery had the right to remain silent and his conviction was therefore reversed.

In the Virginia case, Cullen refused to reply to questions asked him by a grand jury on the ground that the answers would tend to incriminate him. On appeal, the Virginia Court of Appeals found that the compulsory testimony act in question, which provided only use immunity, did not fully protect the witness from the mischief against which the privilege sought to guard and Cullen's conviction was reversed. The *Counselman* Court described the Virginia opinion as follows:

> The court held that the effect of the statute was to invade the constitutional right of the citizen, and to deprive the witness of his constitutional right to refuse to give evidence tending to criminate himself, without indemnity, and that the act was therefore, to that extent unconstitutional and void. It held further that, before the constitutional privilege could be taken away by the legislature, there must be absolute immunity provided; that nothing short of complete amnesty to the witness, an abso-

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[10] *Emery's Case* is quoted and discussed at length in *Counselman*, 142 U.S. at 571-6.

> lute wiping out of the offense as to him, so that he could no longer be prosecuted for it, would furnish that indemnity. 142 U. S. at 577.

Justice Blatchford further relied upon *State* v. *Nowell, supra,* wherein the contempt conviction of a witness who had refused to testify before a grand jury was upheld. The Justice described the state court's opinion in the following terms:

> In regard to the statute, the court said that the legislature, having undertaken to obtain the testimony of the witness without depriving him of his constitutional privilege of protection, must relieve him from all liabilities on account of the matters which he is compelled to disclose; that he was to be secured against all liability to future prosecution as effectually as if he were wholly innocent; that this would not be accomplished if he were left liable to prosecution criminally for any matter in respect to which he might be required to testify; that the statute of New Hampshire went further than the statute of Massachusetts considered in *Emery's Case,* because it provided that the witness had, under the statute, all the protection which the common-law right, adopted by the Bill of Rights in its common-law sense, gave him; that, if he should be prosecuted, a plea that he had disclosed the same offense on a lawful accusation against his principal would be a perfect answer in bar or abatement of the prosecution against himself; and that unless he should testify, the motion for the attachment must be granted. *Id.* at 578-9.[11]

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[11] The Court also cited and discussed with approval *People* v. *Sharp,* 107 N. Y. 427 (1887), wherein the New York Court of Appeals had upheld the compulsion of incriminating testimony about a crime where the witness was made immune from future prosecution for that crime.

This Court expressly chose the rule of transactional immunity in overturning Section 860. After stating that rule, quoted *supra,* at p. 10, the Court continued in the very next sentence: "In this respect, we give our assent rather to the doctrine of *Emery's Case,* in Massachusetts, than to that of *People* v. *Kelly,* in New York; . . ." *Id.* at 586. *Emery* had demanded transactional immunity to sustain compulsory testimony, whereas *Kelly* had accepted use immunity as sufficient.[12]

That this Court was consciously and intentionally adopting the rule of transactional immunity followed in *Emery, Cullen* and *Nowell* was understood by the Government itself which, in its final argument, urged that those cases be distinguished because they involved privileges somewhat broader in language than the privilege honored in the Fifth Amendment. But this Court expressly rejected the effort: "[W]e are of opinion that, however this difference may have been commented on in some of the decisions, there is really, in spirit and principle, no distinction arising out of such difference of language." *Id.* at 586. In this way the Court emphasized what it had just stated, that it was giving its "assent" to the doctrine of *Emery's Case.*

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[12] The statement in the sentence in *Counselman* which follows the sentence just quoted in part in the text above ("Section 806, moreover, affords no protection against the use of compelled testimony which consists in gaining therefrom . . . information which may supply other means of convicting the witness or party."), in no way detracts from the Court's holding. The Court was merely adding as an afterthought to its discussion of the need for transactional immunity that the statute did not even accomplish in fact what it purported to do: that it did not protect the witness from the indirect use of his testimony in a subsequent criminal proceeding.

It was not only the executive branch which recognized that *Counselman* stood for the proposition that a compulsory testimony statute, to comport with the Fifth Amendment, must provide transactional immunity. In the year following, the Congress passed a new statute, 27 Stat. 443, 49 U. S. C. §46 (1893), which provided that no person could refuse to testify before the Interstate Commerce Commission on the ground that answers might incriminate him. But, the statute continued, "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding." It has been noted that in enacting the 1893 statute, Congress broadened the scope of the protection to be afforded by a compulsory testimony provision specifically in order to satisfy the *Counselman* requirement of transactional immunity. *Smith* v. *United States,* 337 U. S. 137, 146-7 (1949); see also *Ullman* v. *United States,* 350 U. S. 422, 436-7 (1956).

When this Court reviewed the 1893 act in *Brown* v. *Walker,* 161 U. S. 591 (1896), the issue was whether *any* kind of immunity could displace the privilege against self-incrimination. The argument was not transactional immunity versus the kind of immunity afforded by the 1970 act in question here. Rather, the question was whether even transactional immunity was constitutionally sufficient. Even while the 1893 act was sustained, four Justices dissented on the ground that a witness' right to remain silent was absolute: even immunity from prosecution was inadequate protection from the infamy and disgrace attendant upon self-revelation of guilt against

which the privilege was intended to protect. The important point is that all the Justices, both those in the majority and those who dissented, assumed that the Fifth Amendment required *at least* transactional immunity in a compulsory testimony provision and proceeded on that belief.[13]

In the years since *Counselman* and *Brown,* this Court has decided numerous cases directly or indirectly involving the question of immunity. Among all these decisions there is not a single one which casts doubt on the continuing validity of the principle that as between the questioning federal sovereign and the federal witness, immunity from prosecution is constitutionally required before the witness may be forced to testify over his claim of Fifth Amendment privilege. Indeed, this Court has on several occasions reaffirmed that rule. So, for example, it held that 11 U. S. C. §25(a) 10, 30 Stat. 544 (1898), was not co-extensive with the Fifth Amendment privilege

> because the present statute fails to afford complete immunity from prosecution. If Congress should hereafter conclude that a full disclosure of the bankrupt estate by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity. *McCarthy* v. *Arndstein,* 266 U. S. 34, 42 (1924).

And in *Hale* v. *Henkel,* 201 U. S. 43, 67 (1906), the privilege against self-incrimination was not a defense to re-

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[13] Two of the dissenters (Justices Field and Gray) had joined the Court's opinion in *Counselman.* It can hardly be supposed that they would have done so had *Counselman* stood for the proposition that something less than transactional immunity was sufficient to satisfy the Fifth Amendment.

fusing to testify after immunity from prosecution was conferred because the Fifth Amendment does not apply "if the criminality has already been taken away."

In *United States* v. *Murdock*, 284 U. S. 141, 149 (1931), this Court stated that it was an established principle "that full and complete immunity against prosecution by the government compelling the witness to answer," is the immunity which "is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock*, 142 U. S. 547 . . ."

Twelve years later, in *United States* v. *Monia*, 317 U. S. 424, 428 (1943), it was noted that *Counselman* "indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege." Similarly, in 1949 this Court stated:

> Through *Counselman* v. *Hitchcock*, 142 U. S. 547, it was established that absolute immunity from federal criminal prosecution for offenses disclosed by the evidence must be given a person compelled to testify after claim of privilege against self-incrimination. To meet that requirement Congress amended the immunity provisions of the Interstate Commerce Act, 24 Stat. 383, §12, that protected a witness from use against him of evidence so given in any subsequent criminal proceeding so as to provide [transactional immunity]. . . . This remission of responsibility for criminal acts met the 'absolute' test of the constitutional provision against self-incrimination. *Smith* v. *United States*, 337 U. S. 137, 146-7 (1949).

And again, in *Adams* v. *Maryland*, 347 U. S. 179 (1954), even while holding that a federal statute providing use

immunity could be invoked to prevent the use in state court of evidence given before a Senate Committee, the Court observed that the statute itself could not compel that Senate testimony: it was inadequate to supplant the privilege against self-incrimination because it was "an act not providing 'complete' immunity from prosecution." *Supra* at 182.

In *Ullman* v. *United States,* 350 U. S. 422 (1956), this Court upheld the Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. §3486(c), which provided for transactional immunity, on the authority of *Brown* v. *Walker, supra.* Writing for the majority, Justice Frankfurter noted that in enacting Section 3486(c) Congress had provided "that immunity from prosecution which the Constitution requires." *Id.* at 436, fn. 12.[14]

Four years later, in *Reina* v. *United States,* 364 U. S. 507 (1960), a witness refused to testify before a federal grand jury on the ground that the immunity afforded him by 18 U. S. C. §1406 was not co-extensive with the privilege against self-incrimination. This Court rejected that

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[14] The statute was upheld over the dissent of Justices Douglas and Black who argued at length that even transactional immunity, much less use immunity, was not co-extensive with the privilege against self-incrimination. 350 U.S. at 440-455. In this connection it should be noted that the Solicitor-General, while Dean of Harvard Law School, expressed the view that the Fifth Amendment requires that a witness be afforded at least transactional immunity and perhaps even greater protection. Referring to Section 3486(c), Mr. Griswold said: "This statute gives a protection against prosecution, and thus meets the literal objective of the Constitution. Nevertheless, because I attach so much importance to the Fifth Amendment and the values which it symbolizes, I look with misgivings upon this statute." Griswold, *The Fifth Amendment Today* (Harvard University Press, 1962), p. 80.

argument because "in safeguarding him against future federal and state prosecution 'for or on account of any transaction, matter or thing concerning which he is compelled' to testify, this statute grants him immunity fully coextensive with the constitutional privilege." *Supra* at 514.

Thus in the years between 1892 and 1960 the Fifth Amendment requirement that as between the questioning sovereign and the witness, transactional immunity must be conferred before the privilege can be displaced remained, through numerous decisions of this Court, not only unquestioned, but was often reaffirmed. In fact, transactional immunity was so firmly embedded in our jurisprudence that in 1956 this Court could observe that it "has become part of our constitutional fabric." *Ullman, supra* at 438.

In the present case, the Court of Appeals sustained the 1970 compulsory testimony provision on the basis of *Murphy* v. *Waterfront Commissioner*, 378 U. S. 52 (1964).[15] Analysis of that decision, however, makes clear that such reliance is misplaced.

In *Murphy*, a witness before a bi-state investigating commission refused to testify despite a grant of immunity from prosecution in either state, on the ground that his answers might tend to incriminate him under federal law, to which the statutory grant of immunity did not purport to extend. Disapproving earlier decisions, this Court first held that "the constitutional privilege against self-incrimination protects a state witness against federal as well as state law and a federal witness against incrimination un-

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[15] See 440 F. 2d at 956-7.

der state as well as federal law." 378 U. S. at 77-78.[16] Thus *Murphy*, which is now cited by the government to support a "niggardly" interpretation of the Fifth Amendment, *Ullman, supra*, at 426, in truth *broadened* the scope of protection that the Amendment requires. Proceeding then to the question of "what effect this holding has on existing state immunity legislation," *id.* at 78, the *Murphy* court concluded that "a state witness may not be compelled [by virtue of a state immunity provision] to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." *Id.*, at 79.

It should be evident that this rule in no way affects the *Counselman* requirement of immunity from prosecution by the questioning sovereign. Nowhere in Justice Goldberg's opinion for the Court is there the slightest disapproval of the continuing vitality of the standard of transactional immunity as the measure of protection to be afforded a federal witness in the federal jurisdiction. Rather it is clear that the *Murphy* court was addressing itself to the problems of federalism that arise in a dual sovereignty situation. The Court itself stated that the issue presented was "whether, absent an immunity provision, *one jurisdiction* in our federal structure may compel a witness to give testimony which might incriminate him under the laws *of another jurisdiction*." 378 U. S. at 54 (emphasis added). As the Court then noted, the exclusionary rule it was formulating flowed from the need

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[16] *United States* v. *Murdock*, 284 U.S. 141 (1931); *Feldman* v. *United States*, 322 U.S. 487 (1944); and *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958), insofar as they conflicted with that holding, were found to be a "deviation," *supra* at 77, from the proper construction of the Fifth Amendment.

to "accommodate the interests of the State and Federal Governments in investigating and prosecuting crime." *Id.*

We believe that the *Murphy* standard is the correct standard where the interests which were at stake in *Murphy* are present. But where, as here, those interests have no application, then, too, the standard has no application. Having held that the Fifth Amendment privilege protects a state witness from incrimination under federal as well as state law, the *Murphy* court was faced with two alternatives in defining the measure of protection against incrimination under federal law. On the one hand, it might hold that the Fifth Amendment demands immunity from federal prosecution whenever a state witness testifies pursuant to a grant of immunity from state prosecution. But to hold that a state witness *automatically* acquired immunity from *federal* prosecution whenever the state granted him immunity from state prosecution would allow a return to the thoroughly discredited "immunity baths" of the past, when corrupt prosecutors would intentionally and enthusiastically authorize grants of immunity in order to protect bedfellows from prosecution for a crime which had been committed. If this alternative had been adopted in *Murphy*, it would have been possible to preclude federal prosecution simply by conferring immunity from state prosecution. Federal attorneys would have had to stand by helplessly while state officials unscrupulously but effectively precluded trial and punishment of a federal offender.

There was a second alternative, however, the one adopted in *Murphy*, which would afford the state witness adequate protection without in any way allowing possible interference with the law enforcement responsibilities of the separate federal jurisdiction. By demanding immunity

from federal use of testimony compelled by a state immunity grant, the Court made extremely remote the possibility of incrimination under federal law by testifying in the second and separate jurisdiction. But by not assuring automatic immunity from federal prosecution as a result of the state compelled testimony, the Court avoided any state interference with federal law enforcement prerogatives. The federal jurisdiction was just as free after the state testimony as before it to pursue and punish violators of federal law. In the Court's language, the *Murphy* rule "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U. S. at 79. The interests of each sovereign, competing against each other in the *Murphy* situation, were thereby neatly and properly reconciled.[17]

In the present case, only one jurisdiction is involved and, consequently, the federal-state problems which arose in *Murphy* are absent. In particular, there is no need to protect the law enforcement responsibilities of the federal jurisdiction from the possibility of unscrupulous

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[17] That *Murphy* was concerned solely with the proper adjustment of federal-state law enforcement interests was emphasized forcefully by Justice Harlan in his concurring opinion. Refusing to give constitutional status to the standard of immunity from federal use of state compelled testimony, Justice Harlan nevertheless adhered to that standard under the Court's supervisory power. He spoke of the need for a rule protective of the values expressed by the privilege against self-incrimination "without in any way interfering with the independent action of the States and the Federal Government in their respective spheres," 378 U.S. at 91, and noted that the rule adopted in *Murphy* was an "adjustment between state investigations of local crime and federal prosecution for federal crime." *Id.* at 91-92.

state encroachment, because under Sections 6002-3 it is the federal jurisdiction alone, acting through the Attorney-General or a designated assistant and the local United States Attorney, which controls the granting of immunity in the federal jurisdiction. The standard in the dual-sovereignty circumstances has, therefore, no relevance to the facts of this case.

That *Murphy* was not intended to modify the requirement of transactional immunity where only the federal jurisdiction is involved was amply demonstrated by this Court by its opinion in *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965). In determining the constitutionality of Section 4(f) of the Subversive Activities Control Act of 1950, 64 Stat 992, 50 U. S. C. §783(f), the Court said:

> In *Counselman* v. *Hitchcock,* 142 U. S. 547, decided in 1892, the Court held 'that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . .,' and that such a statute is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard . . .' by affording 'absolute immunity against future prosecution for the offence to which the question relates.' *Id.* at 585-586. *Measured by these standards,* the immunity granted by §4(f) is not complete. 382 U. S. at 80 (Emphasis added).

Thus, more than a year after *Murphy*, this Court still embraced transactional immunity as the Fifth Amend-

ment requirement where only a single jurisdiction is involved.[18]

The Fifth Amendment prohibition against prosecution of a grand jury witness for a transaction to which his compelled testimony relates is supported not only by an unbroken line of decisions of this Court over the past eighty years but by an analysis of the values the privilege against self-incrimination is intended to protect. This Court has declared that the privilege

> reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev. 1961), 317; our respect

[18] And in *Stevens* v. *Marks*, 383 U.S. 234 (1966), the Court noted that because the contempt conviction there for refusing to testify before a grand jury was invalid on other grounds, it did not need to determine whether the immunity purportedly conferred in that case, which was immunity from the direct or indirect use of the grand jury testimony, "constitutes that 'absolute immunity against further prosecution' about which the Court spoke in *Counselman* v. *Hitchcock*, 142 U.S. 547, 586, and which the Court said was necessary if the privilege were to be constitutionally supplanted. And see *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79-81." *Id.* at 244-45.

> for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' *United States* v. *Grunewald,* 233 F. 2d 556, 581-582 (Frank, J., dissenting), rev'd. 353 U. S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' *Quinn* v. *United States,* 349 U. S. 155, 162, 99 L. Ed. 964, 972, 75 S. Ct. 668, 51 A.L.R. 2d 1157. *Murphy, supra* at 55.

And see 8 Wigmore, *Evidence* (McNaughton Rev. 1961), pp. 302 *et seq.*

As Justice Brennan has noted, use immunity offends many if not most of the Fifth Amendment interests enunciated in *Murphy.*[19] Certainly, for example, it drastically lessens the requirement that "the government in its contest with the individual . . . shoulder the entire load." The government attorney is almost always not only present in the grand jury proceeding but actually conducting the questioning. His eliciting from a witness testimony which may be self-incriminating lessens the responsibility assigned the government in our adversarial system of criminal justice of building the case against a defendant wholly on its own. When a witness is compelled to relate the full and detailed story of how, when and why he in fact committed a violation of federal law, he is substantially reducing the obligation of the government to shoulder the entire load in going forward with the prosecution that is still permitted under Section 6002. Despite the

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[19] *Piccirillo* v. *New York,* 400 U.S. 548, , 91 S. Ct. 520, 530 (1971) (dissenting from dismissal of certiorari).

fact that the government attorney's source of evidence to be introduced at trial must, under the 1970 act, be wholly independent of the evidence adduced before the grand jury, nevertheless, the grand jury testimony tells the government attorney in the greatest detail precisely what the evidence is against the witness for which an independent source must be constructed. In short, even if the witness' testimony is not itself evidence which can be used directly or indirectly at trial, it informs the prosecution what the facts of the matter are which *can and should* be proved at trial. In *Counselman* v. *Hitchcock,* the Court disapproved use immunity on this ground, observing that it can never afford "protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime," 142 U. S. at 586, for which the witness may then be prosecuted.

The standard in judging whether or not an immunity is co-extensive with the privilege against self-incrimination, *Counselman* v. *Hitchcock, op. cit.,* is whether the witness and the questioning jurisdiction are in the same position vis-a-vis each other after the testimony is given under compulsion as they would be if the witness properly pleaded the privilege and no immunity was offered. See *Murphy* v. *Waterfront Commissioner,* 378 U. S. at 79. In enabling the government to learn every detail of every element of a federal offense the witness may have in fact committed, and for which he may then be prosecuted, Section 6002 plainly does not leave the witness and the questioning jurisdiction in the same balance they were in before the testimony was compelled. After testimony the government attorney then (1) knows whether a case can subsequently be made against the witness and (2) knows the facts for which an independent source must be constructed.

With respect to knowledge of the first element, the very determination to seek an independent source of information, i.e., the determination to prosecute, may well spring from the testimony compelled under a grant of use immunity. Examining a witness under compulsion before a grand jury enables the government to determine whether or not the witness is probably guilty of a federal offense. If the evidence shows the witness is probably guilty then an attempt will be made to construct an independent source for that evidence to be used in a prosecution, whereas such an attempt might well never have been made if the witness had not testified. In other words, *but for* the testimony compelled through use immunity, the decision to prosecute and therefore to create an independent source would often not be made. In exchange for information, the government has offered only the increased likelihood of prosecution.

The prosecutor also gains knowledge of the facts for which an independent source can then be created. It is one thing to come upon facts by means of an untainted source when the facts are being unearthed *de novo;* it is quite another to be able to construct an independent source when the government already knows exactly what it is looking for. In the former situation, an untainted source is developed while working toward an unknown end. In the latter, the source is constructed while the government knows precisely where it is going. This result-orientation enables even the most inept sleuth to eventually construct an independent source.

The effect of the knowledge gained by the prosecutor through his compelling testimony by providing federal use immunity is thus properly summarized by observing that a person is in fact much worse off in regard to the danger of federal prosecution and conviction than if he

had remained silent. That is a fundamental constitutional flaw in the 1970 compulsory testimony statute. See *Murphy, supra* at 79.

In noting the Fifth Amendment interest in "a fair state-individual balance," this Court also spoke of the requirement that "the government . . . leave the individual alone until good cause is shown for disturbing him." *Op. cit.* Section 6002 poses a substantial threat to the survival of that constitutional value. By retaining the ability to prosecute, the statute allows for, indeed encourages, the "fishing expeditions," *In re Dionisio, op. cit.*, to which we alluded earlier and which have become commonplace in the last year.[20] The inability subsequently to prosecute an individual if answers are to be obtained to incriminating questions deters to some extent broad and vague investigations commenced by government attorneys before a grand jury with little or no hard evidence or even indication of possible violation of federal law by a given person. For if the government attorneys have small idea who may have committed a crime or whether one has been committed, they will be less likely to offer immunity from prosecution, because they risk unintentionally immunizing from penal sanction those persons who may be primarily and principally responsible for the violation.

Allowing the compulsion of testimony by a grant of mere use immunity removes that deterrence. It encour-

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[20] As attorneys heavily involved in investigations before numerous grand juries, we have seen question after question asked of witnesses which are not designed to put before the grand jury specific facts about a specific event but, rather, are the most generla type of inquiries, frequently along the lines of: "Tell all you know about . . ." or "Give the names of all the people you met during the months of . . ."

ages the use of the grand jury and grand jury process as a broad discovery device, because it allows the asking of questions which are entirely speculative and for which the government attorneys may have no present answers, while allowing subsequent prosecution if, by chance, the fishing expedition proves rewarding.

Complementing the Fifth Amendment requirement to leave the individual alone until good cause is shown for disturbing him is "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life. . . .'" *Op. cit.* In this regard the privilege against self-incrimination acts to protect rights assured as well by the Fourth Amendment, *Boyd* v. *United States,* 116 U. S. 616, 635 (1886), and the First Amendment. *Stanley* v. *Georgia,* 394 U. S. 557 (1969).

The need to shield values implicit jointly in the Fifth and First Amendments is especially strong today. In recent months investigations before grand juries in Tuscon, Arizona; Seattle, Washington; Detroit, Michigan; Harrisburg, Pennsylvania; Washington, D. C.; and Brooklyn, New York, *all* involve investigation of persons who dissent or are thought to dissent from the political judgments of our government and who express criticism of those judgments and of those who implement them. Furthermore, the charge of conspiracy, always implicating First Amendment interests, is once more in our history "the darling of the prosecutor's nursery." There is no federal grand jury investigation commenced today to look into acts by persons opposed or thought to be opposed to present governmental policies, that does not include investigation of violation of 18 U. S. C. §371.

The question posed by United States Attorneys in these grand juries include broad inquiries into political

affiliations, organizations and discussions.[21] It would be one thing if there was a specific question relating to a political group, affiliation or discussion for which the prosecutor expected to obtain a specific answer. But this is usually not the case. Instead the inquiries are primarily "fishing expeditions" into political activity by the witness which have the side effect, either intended or unintended, of inhibiting future political activity.[22] As we have discussed, *supra,* at pp. 28-9, it is the ability to offer only use immunity which directly increases the government's ability to engage in these types of proceedings.

Finally, it can also be seen that the immunity offered by §§6002-3 is largely illusory. The statute provides that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used

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[21] E.g., the question has frequently been asked: 'What is X organization, what are its aims and purposes, and who are its members.' Or: 'Who was at a particular meeting, what was discussed, and who said what?'

[22] The Solictor-General has noted the importance of the privilege against self-incrimination as a bulwark against this kind of governmental conduct:

> Where matters of a man's belief or opinions or political views are essential elements in the charge, it may be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought and a hindrance to any government which might wish to prosecute for thoughts and opinions alone. Griswold, *The Fifth Amendment Today,* supra, at 8-9.

against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." To say this *caveat* to the provision ordering the witness to testify over his claim of constitutional privilege adequately protects the Fifth Amendment interests of the witness ignores the fact that the person who will subsequently be able to prosecute the witness is the same person who elicits his testimony before the grand jury. If a person is indicted for a transaction concerning which he testified under compulsion pursuant to §6002, a motion to suppress evidence will follow virtually automatically. And a lengthy hearing, delaying the adjudication of guilt or innocence, will then be necessary to determine the possible tainting of every piece of the government's case. Even so, the hearing will be of dubious worth to the defendant. It is true that once he has shown that the transaction for which he is being prosecuted relates to his testimony before the grand jury, the government has the burden of showing that it nevertheless obtained its evidence from an independent source. But the witness would be hard pressed to examine the validity of the government's claim because all the facts which could disprove the claim are usually exclusively in the hands of the government itself.[23] It is not only a question of exposing a conscious use of grand jury testimony. Perhaps even more significant is the difficulty of detecting and establishing unconscious and unintentional use of the grand jury testimony. As Justice Brennan has noted:

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[23] Even as to those facts which are not, as Judge Motley has noted: "To say that a witness can successfully rebut the Government's proof that its source is untainted is to be naive about the imbalance which daily attends the resources of Government as opposed to those of the average defendant in a criminal case." *Kinoy, supra,* at 419.

> Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained. By hypothesis, the situation involves one jurisdiction with presumably adequate exchange of information among its various law enforcement officers. Moreover, the possibility of subtle inferences drawn from action or non-action on the part of fellow law enforcement personnel would be difficult if not impossible to prove or disprove. This danger, substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction which compelled the testimony. Concern over informal and undetected exchange of information is also correspondly less when two different jurisdictions are involved. *Piccirillo* v. *New York, supra.*[24]

We respectfully submit that because, as we have shown, the 1970 federal immunity provision fails to provide protection as broad as the mischief against which the privilege against self-incrimination seeks to guard, *Counsel-*

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[24] We would also note that whatever the reduced possibility of such an unintentional use of testimony in a situation where only one sovereign but two separate agencies within that jurisdiction are involved, see, e.g., *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation,* 426 F. 2d 619 (2nd Cir., 1970), *cert. pending,* No. 69-6 (Oct. Term, 1971), no such possibility exists here where not only is the office responsible for prosecution the office which is also responsible for presenting the evidence to the grand jury, but frequently it is the very same United States Attorney who will perform both functions.

man v. *Hitchcock, op. cit.*, it violates that constitutional provision.

In *Ullmann* v. *United States,* at a time when the cry for "law and order" was as loud as it is today and when, like today, "national security" had become a slogan in the name of which constitutional liberties were abridged, Justice Frankfurter spoke eloquently and at length for this Court of the "spirit in which the Fifth Amendment's privilege against self-incrimination should be approached." 350 U. S. at 426:

> It is relevant to define explicitly the spirit in which the fifth amendment's privilege against self-incrimination should be approached. This command of the fifth amendment ('nor shall any . . . person be compelled in any criminal case to be a witness against himself * * *') registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' [Citing Griswold, 'The Fifth Amendment Today' (1955), 7.] Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They, too, readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The founders of the Nation were not naive or disregardful of the interests of justice * * *.

No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a save a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies.

As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. It is appropriate to read the conviction expressed in a memorable address by Senator Albert J. Beveridge to the American Bar Association in 1920, a time when there was also manifested impatience with some of the restriction of the Constitution in the presumed interest of security. His appeal was to the Constitution—to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor.* To view a particular

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*"If liberty is worth keeping and free representative government worth saving, we must stand for *all* American fundamentals—not some, but all. All are woven into the great fabric of our national well-being. We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient. If one American fundamental is prostrated, others in the end will surely fall. The success or failure of the American theory of society and government, depends upon our fidelity to every one of those interdependent parts of that immortal charter of orderly freedom, the Constitution of the United States." Beveridge, The Assault upon American Fundamentals, 45 Reports of American Bar Ass'n, 188, 216 (1920).

provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution. 350 U. S. at 426-9.

If the Court adheres to the "spirit" of which it spoke in *Ullman,* the 1970 immunity act must necessarily be declared unconstitutional.

CONCLUSION

For the aforegoing reasons the judgments of contempt must be reversed.

Respectfully submitted,

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Certificate of Service

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IN THE

Supreme Court of the United States

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~~No. 1562~~ 70-117

CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

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House Report No. 91-1188, 91st Cong. 2d Sess., 6/15/70, Accompanying H.R. 11157, p. 13 36

House Report No. 91-1188, 91st Cong., 2nd Sess., Accompanying H. R. 11157, pp. 39, 42 38

United States Congressional Code & Administrative News, 91st Cong., 2nd Sess., No. 12 (Nov. 20, 1970), p. 4706 26

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84 Statutes at Large, p. 930 26

84 Statutes at Large, p. 932 2

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Textbooks

Chafee, The Blessings of Liberty (Lippincott Press, 1956), pp. 193-194 20

Chafee, The Blessings of Liberty (1st Ed., 1956), p. 195 ..... 28, 29, 30, 31

Chafee, The Blessings of Liberty (Lippincott Press, 1956), p. 207 21

Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Michigan Law Review, pp. 1, 5 29

Franklin, Infamy and Constitutional Civil Liberties, 14 Lawyers Guild Review (1954), pp. 1-10 20

Franklin, The Encyclopédiste Origin of the Fifth Amendment, 15 Lawyers Guild Review (1955), pp. 41, 53 20

Griswold, Dean Erwin, The Fifth Amendment Today, Harvard University Press (1955), p. 20 33

Griswold, The Fifth Amendment Today (Harvard University Press, 1955), p. 16 21

1 Howe State Trials, p. 1271 20

Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Supreme Court Review, pp. 103, 165 38

Morgan, E. M., The Privilege Against Self-Incrimination, 1949, Minnesota Law Review, pp. 1, 5-10 ..... 28, 29

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Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Virginia Law Review (1935), pp. 763, 772-776 ..... 30, 31

Rogge, Compelling the Testimony of Political Deviants, 55 Michigan Law Review (1955), pp. 375, 383 39

Rogge, New Federal Immunity Act and the Judicial Function, 45 California Law Review (1957), pp. 109, 133 37

Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 Saint Louis University Law Journal (1965), pp. 371, 372 21

Wigmore on Evidence (3d Ed.), McNaughton Rev. Ed., 1961, p. 296 15

Wigmore on Evidence (3d Ed.), McNaughton Rev. Ed., 1961, pp. 313-314 21

8 Wigmore on Evidence (3d Ed., McNaughton Rev., 1961), Sec. 2250, p. 270 .....27, 28, 30

IN THE

Supreme Court of the United States

October Term, 1970
No. 1562

CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the Court of Appeals (App. 71-76) is reported at 440 F. 2d 954 (C.A. 9, 1971).

Jurisdiction.

The judgment of the Court of Appeals was entered March 10, 1971 (App. 70). An order of said Court was made and filed on March 30, 1971, staying said judgment pending the filing, consideration and disposition by this Court of a Petition for Writ of Certiorari on condition that said petition be filed on or before April 10, 1971. The Petition was filed April 8, 1971 and was granted May 17, 1971 (App. 77).

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Question Presented.

Whether a witness can be compelled on pain of imprisonment to testify before a federal grand jury under a federal grant of immunity over his claim of the privilege against self-incrimination secured to him by the Fifth Amendment to the United States Constitution, irrespective of the scope of immunity so conferred, and in any event, where such immunity leaves the witness subject to prosecution for the transaction concerning which he has been required to testify.

Constitutional and Statutory Provisions Involved.

The clauses of the Fifth Amendment to the United States Constitution applicable here, state:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ."

The statutes involved herein are titles II and III of the Organized Crime Control Act of October 15, 1970 which contain a general immunity statute (Title 18, U.S.C. §§ 6001-6005; Pub. L. 91-452, Title II, §201 (a); 84 Stat. 926); and an enforcement section (Title 28, U.S.C. § 1826, Pub. L. 91-453, Title III, §301(a), Oct. 15, 1970, 84 Stat. 932), the pertinent provisions of which are as follows:

18 United States Code—

Part V—Immunity of Witnesses.

* * *

§ 6002. Immunity Generally.

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a Court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two houses, or a committee or a sub-committee of either House, and the person presiding over the proceeding communicates to the witness an order under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

§ 6003. Court and Grand Jury Proceedings.

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the

request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

Title 28, United States Code—

§ 1826. Recalcitrant Witnesses.

"(a) Whenever a witness in any proceeding before or ancillary to any Court or grand jury of the United States refuses without just cause shown to comply with an order of the Court to testify or provide other information, including any book, paper, document, record, recording or other material, the Court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such informa-

tion. No period of such confinement shall exceed the life of—

"(1) The Court proceeding, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

"(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

Statement of the Case.

Petitioners were each summoned to appear and testify before a federal grand jury in Los Angeles, California on February 4, 1971.[1]

Before being examined, petitioners were requested to and did appear, with counsel, in the United States District Court for the Central District of California, Hon. Avery E. Crary, Judge Presiding, whereupon the Assistant United States Attorney presented a written application for an order compelling petitioners to testify under a grant of use-immunity pursuant to Title 18, United States Code, Sections 6002-6003 (App. 54-

[1]Petitioner Kastigar had previously appeared on the same transaction before the grand jury on September 9, 1970, pursuant to subpoena, at which time he declined to testify on grounds of self-incrimination. No immunity was offered at that time, the statute at bar not yet having become operative, and he was excused (App. 60).

56, 58-60). Petitioners, by their counsel, opposed the application on grounds, *inter alia,* that the statutes did not provide immunity co-extensive with the protection afforded by the Fifth Amendment and therefore the proposed order would violate that constitutional provision (App. 5, 8, 15).

The court continued the cause to February 11, 1971, and ordered petitioners to reappear at that time (App. 29).

On February 11, the District Court made and entered a written order under Title 18 U.S.C. §§6002 and 6003 directing each petitioner to "appear forthwith before the grand jury and testify or produce evidence with respect to all matters under inquiry by the grand jury." (App. 55 and 59).

Petitioners were then directed by the court to, and did each appear before the grand jury. Petitioner Kastigar was asked the following question:

> "Q. [By the Assistant U.S. Attorney]: Mr. Kastigar, as we told you before, the grand jury has received a great deal of information concerning a situation in which you had orthodontic braces placed on your teeth just prior to reporting for military induction and had them removed just after a word by a Dr. Bernard Bender, with offices at 8328 DeSoto in Canoga Park.
>
> "Would you tell us, please, how that came about?"

To which question petitioner Kastigar answered as follows:

> "I'm sorry, I decline to say anything about that on the basis that my answer may tend to incriminate me and on the advice of counsel." (App. 48).

In response to another question, petitioner Kastigar stated he would continue invoking the Fifth Amendment privilege against self-incrimination notwithstanding the court's order (App. 48).

Petitioner Stewart was asked the following question before the grand jury:

> "Q. [By Assistant U.S. Attorney]:
> Would you please tell us how it came about that you went to Dr. Bender for the so-called dental services which I described."
>
> To which Stewart replied:
> "Okay, on that I will have to respectfully decline to answer on the ground that it may tend to incriminate me." (App. 48-49).

Petitioner Stewart likewise indicated that he would invoke the Fifth Amendment privilege in response to all further questions (App. 49).

Thereafter, both petitioners arppeared as ordered before said District Court. The grand jury reporter read the afore-described responses of each petitioner. The court then ordered petitioners to answer said question on pain of imprisonment for civil contempt. Each petitioner again refused upon a claim of the privilege against self-incrimination (App. 47-50).

The court thereupon adjudged each petitioner to be in contempt, and ordered them into the custody of the Attorney General until the questions were answered or during the life of the grand jury (App. 49, 50-51).

Upon petitioners' request, that order was stayed until noon, February 16, 1971 (App. 51-52).

On February 12, 1971, petitioners each filed Notice of Appeal from said orders, and a motion for stay of

execution pending disposition thereof on appeal (App. 68-69).

On February 16, 1971, the Court of Appeals for the Ninth Circuit extended the stay pending disposition of petitioners' said motion (App. 65-67) and on February 19, 1971, further extended the stay pending disposition of the appeal in an order which also consolidated petitioners' respective appeals, directed that the appeal be expedited under 18 U.S.C. §1826(b), and provided a briefing and argument schedule which allowed petitioners six (6) days to file their opening brief.

The appeal was argued on March 10, 1971;[2] and later that day, the Court of Appeals rendered its judgment affirming the orders of the District Court adjudging petitioners in civil contempt and ordering them confined (App. 70).

The opinion of the Court of Appeals was filed on March 29, 1971 (App. 71). In it, the Court upholds the federal use-immunity statute at bar as co-extensive with the self-incrimination clause of the Fifth Amendment, relying chiefly on *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, at p. 79 (1964) (App. 74).

Although the statute involved in *Murphy* conferred *transactional* immunity, and was expressly construed to accommodate delicate federal-state relations in the area of crime repression and law enforcement (378 U.S. at p. 79), the Court below read the majority opinion, and the concurring opinion of Mr. Justice White (378 U.S. at pp. 100-107), as approving use-immunity even within a single jurisdiction—the federal system. The Court

[2]Counsel for petitioners was permitted a total of only fifteen minutes in which to present his argument.

below failed to reconcile its conclusion with—or even cite—*Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), decided one year after *Murphy,* wherein this Court struck down a federal use-immunity statute as incompatible with the Fifth Amendment Privilege.

Petitioners are therefore each adjudged in civil contempt, for refusal to comply with an order of the United States District Court for the Central District of California, made over their respective claims to the Fifth Amendment privilege against self-incrimination, directing each petitioner to answer questions before a federal grand jury inquiring into violations of the Selective Service laws. By reason of said judgment, petitioners have been ordered confined in prison pending compliance with said order. Execution of the judgments below has been stayed by the Court of Appeals below pending the determination and disposition of this Writ.

Summary of Argument.

The legislative history of 18 U.S.C. §§6002-6003 expressly discloses a Congressional intent to substitute "use" for "transactional" immunity.

The question presented is Whether such a statute effectively displaces the protection afforded by the Fifth Amendment privilege.

Implied in that question is the larger one, that is, Whether Congress has the power to enact a law which compels any person to incriminate himself on pain of imprisonment.

Although that question was answered affirmatively in *Brown v. Walker,* 161 U.S. 591 and *Ullman v. United*

States, 350 U.S. 422 (1956), petitioners submit that the rationale of the *Brown* majority has been substantially undermined by subsequent decisions of this and other courts in the Fifth Amendment field, and that it is not consistent with contemporary Constitutional standards. Accordingly, petitioners are asking this Court to review and reconsider *Brown, supra* and like cases, with a view to holding them inconsistent with the commands of the Fifth Amendment Privilege.

Toward this end, petitioners propose to state briefly several reasons why compulsory immunity is believed incompatible with the Fifth Amendment Privilege.

First, we contend that the Fifth Amendment means precisely what it says, that "No person . . . shall be *compelled* to be a witness against himself." (Emphasis supplied). The point made here is that compulsory self-incrimination under an immunity law is irreconcilable with the long line of decisions of this Court holding that forced confessions violate the Amendment Privilege.

As the Solicitor General once wrote:

> "Neither torture nor an oath nor the threat of punishment *such as imprisonment for contempt* should be used to compel him [i.e., the witness] to provide the evidence to accuse *or* to convict himself. If his crime is a serious one, careful and often laborious police work may be required to prove it by other evidence." *Griswold, The Fifth Amendment Today,* Harvard Univ. Press, 1955, at p. 8 (Emphasis supplied).

Second, is petitioners' contention that immunity, like a pardon, cannot be imposed upon an unwilling witness as a means of compelling him to incriminate

himself. Since the privilege is personal to the witness, it can be waived only by him, not by government.

Third, it is shown that no statutory immunity is co-extensive with the Fifth Amendment Privilege without judically diminishing its scope to the detriment of liberty.

Fourth, Petitioners suggest that however laudable may be the purposes of statutory immunity, such objectives cannot be balanced against the right of silence guaranteed by the privilege, except, of course, through the Constitutional Amending process.

However, if immunity from prosecution is deemed still a permissible substitute for the Fifth Amendment Privilege, it is clear that nothing less will do. For manifestly, use-immunity not only falls woefully short of the minimum standards set forth in *Counselman v. Hitchcock,* 142 U.S. 547 and *Brown v. Walker,* 161 U.S. 591, but it is also a menace to constitutional liberty.

In support of that view, petitioners proceed to analyze use-immunity conceptually and as formulated in the statute at bar.

First, petitioners show that the use-immunity provisions here were intentionally adopted by Congress based on some language appearing in *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, at p. 79 (1964), notwithstanding the absence of any opinion reversing *Counselman,* and despite the fact that *Counselman* was re-affirmed by this Court one year later.

Second, petitioners will show that historically, the privilege against self-incrimination was founded on resistence to testimonial compulsion, and its historical

imperatives are irreconcilable with the use-immunity concept.

Third, the statute at bar permits overly broad interrogation power which, in the setting of a grand jury proceeding, endangers not only the witness, but the liberty of all.

Fourth, it is shown that use-immunity, inherently and as implemented by this statute, confers overwhelming and unfair advantages upon the government, thereby exposing the witness to perils proscribed by the Fifth Amendment.

Fifth, on its face and as applied, the use-immunity statute at bar not only suffers but encourages the abuse of overly broad interrogation power by removing from the courts the power to control or interfere with it.

Sixth, petitioners point out that use-immunity is, illusory at best, even though government may have the burden of proving its evidence against an immunized witness was independently acquired.

Seventh, petitioners attempt to demonstrate that use-immunity cannot be co-extensive with the Privilege because dependent for its implementation on rules which, in effect, will expose an immunized witness to conviction based on testimony from his own mouth.

Eighth, and last, petitioners synopsize the issue with the question, why use-immunity? And with the conclusion, that the unfairness and abuse inherent in use-immunity requires the government to choose between getting desired testimony *or* prosecuting. To give the government both options deprives petitioners of rights guaranteed by the Fifth Amendment.

ARGUMENT.

I.

The Fifth Amendment Privilege Against Self Incrimination Denies Government the Power to Compel Any Person to Incriminate Himself Involuntarily, Even Though Granting Him Immunity From Prosecution for Transactions to Which His Testimony Relates; and Therefore Precedent to the Contrary Should Be Reconsidered.

Before discussing the use-immunity statute at bar, petitioners believe this Court should re-examine the policies and rationale which have heretofore sustained immunity statutes as such. Accordingly, petitioners will try to show that in its application and reason, statutory immunity is utterly incompatible with the historic dimensions and imperatives of the Fifth Amendment Privilege, as construed and applied by this Court; and that to compel a witness to testify involuntarily contravenes the plain command of that Amendment.

1. Compulsory Self-Incrimination Under a Grant of Immunity Is Incompatible With Decisions of This Court Condemning Such Process as Violative of the Fifth Amendment.

This Court has repeatedly noted that one of the principal policies underlying the Privilege is "the inviolability of the human personality" and that—

> "Our accusatory system of criminal justice demands that the Government seeking to punish an individual produce the evidence against him by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth."

Miranda v. Arizona, 384 U.S. 436, at p. 460 (1965);

Chambers v. Florida, 309 U.S. 227, 235-238 (1940).

It has always been deemed essential that the Privilege be construed liberally, that is, to effectuate its purposes and efficacy. *Spevac v. Klein,* 385 U.S. 511, 515-516 (1967); *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 81 (1965) (*holding use-immunity statute unconstitutional*); *Miranda v. Arizona, supra,* 384 U.S. at p. 461; *Boyd v. United States,* 116 U.S. 616, 635 (1884). As Mr. Justice Frankfurter suggests in *Ullman v. United States, supra,* 350 U.S. at p. 439:

> "This Constitutional Privilege must not be interpreted in a hostile or niggardly spirit."

Yet, the *Brown*[3] and *Ullman* courts declined to read the Fifth Amendment Privilege as guarding against the evils of compulsory self-incrimination, even though such construction would seem to be the one suitable to its history, and the interpretation most likely to effectuate the purpose which its framers and ratifiers intended—the preservation of individual dignity (See: *Miranda v. Arizona,* 384 U.S. 436, 460 (1965)).

If the history which wrought the Privilege is thought too remote, surely the McCarthy epoch, so recently upon us, revived the lessons of the Star Chamber: that the broader the scope of the power to inquire, the greater the inducement to exercise it fully and oppressively; and correlatively, the greater the pressure upon the suspect to impart to his protagonists not only what he knows, but what he believes they want to hear. (See: *e.g. Communist Party v. Subversive Activities Control Board,* 351 U.S. 115 (1956); *Mesarosh v. United States,* 352 U.S. 1 (1956) *Flynn v. United States,* 130 F. Supp. 412 (S.D.N.Y., 1955)).

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[3]*Brown v. Walker,* 161 U.S. 591, 600, 605-606 (1896).

From his own historical analyses of the Privilege, Wigmore concluded:[4]

> ". . . Any system of administration which permits the prosecution to trust habitually to compulsory self disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and to torture. If there is a right to an answer, there soon seems to be a right to the expected answer —that is, to confession of guilt. Thus, the legitimate use grows into the unjust abuse . . . Such seems to have been the course of experience in those legal systems where the privilege was not recognized."

Since *Bram v. United States,* 168 U.S. 532, 547 (1897), this Court has consistently condemned compulsory incrimination as incompatible with the Privilege, regardless of the mode or source of the coercion. (*Compare: Brown v. Mississippi,* 297 U.S. 278 (1936) (*physical beating*); *Chambers v. Florida,* 309 U.S. 227 (1940) (*physical and mental pressure*); *Watts v. Indiana,* 338 U.S. 49 (1949) (*Protracted interrogation*); *Spano v. New York,* 360 U.S. 315 (1959). (*False sympathy, coupled with denial of counsel*); *McNabb v. United States,* 308 U.S. 332 (1943); (*pro-*

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[4]*Wigmore, on Evidence,* 3d Ed., McNaughton Rev. Ed., 1961, at p. 296, n. 1.

longed interrogation); *Blackburn v. Alabama,* 361 U.S. 199 (1960) (*Psychological pressure*); *Miranda v. Arizona, supra,* 384 U.S. 436 (1967) (*denial of counsel*) *Semble: Moore v. Michigan,* 355 U.S. 155 (1957) (*Guilty plea out of fear of mob violence*) with *Garrity v. New Jersey,* 385 U.S. 493 (1967) (*threat of loss of employment*) and *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965) (*fear of prosecution*)).

Invariably, the test applied to such cases is whether the suspect has been deprived of his "free choice to admit, to deny, or to refuse to answer" (*Lisenba v. California,* 314 U.S. 219, 241 (1941)). In *Garrity v. New Jersey, supra,* it was held that the option between loss of employment and self-incrimination was "the antithesis of free choice to speak out or remain silent." (385 U.S. at p. 496).

Here, of course,—as in *Udall's* case,[5] the alternative is not simply loss of job, but jail!

While imprisonment for civil contempt is perhaps a milder form of compulsion than the rack and the screw, or *peine forte et dure,* its continued employment after several centuries as a device for compelling testimony attests to its persuasiveness.

> "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be cruel and unjust; and it would seem the search for evidence is disallowed upon the same principle." Lord Camden, in *Entick v. Covington,* 19 Howell St. Tr. 1029, as quoted in *Boyd v. United States, supra,* 116 U.S. 616 at p. 629 (1886).

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[5]See page 29 *infra.*

True, the Court is not asked to reverse a conviction resting on a coerced confession, but to bar the process by which such tainted evidence is obtained. Yet, the principles and objectives are the same—that is, preservation of individual dignity and judicial integrity (*Elkins v. United States,* 364 U.S. 206 (1960); *Mapp v. Ohio,* 367 U.S. 643, 660 (1961); *McNabb v. United States,* 308 U.S. 332, 345).

> "Fastidious regard for the honor of the administration of justice requires the Court to make certain the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be made." *Communist Party v. Subversive Activities Control Board, supra,* 351 U.S. 115, at p. 124.

Plainly, a conviction resting on a confession or admission secured by threatening to imprison the accused until he implicates himself would offend the Fifth Amendment Privilege. The illegality of such a method is not cured merely because Congress has inserted it into a use-immunity statute. Nor can such methods be tolerated by the courts "without making . . . themselves accomplices in willful disobedience of law". (*McNabb v. United States, supra,* 308 U.S. at p. 345).

> "Out of regard for its own dignity as an agency of justice and custodian of liberty, the Court should not have a hand in such 'dirty business'." (*People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905 (1955), quoting *Holmes, J., dissenting in Olmstead v. United States,* 277 U.S. 438, 470 (1928)).

2. Immunity, Like Pardons, Cannot Be Thrust Upon an Unwilling Witness as a Means of Compelling Him to Incriminate Himself.

In any event, it is submitted that immunity, like a pardon, may only be conferred upon a witness with his consent. The notion that Government may suspend or withhold a citizen's constitutional rights at its own pleasure seems noxious to the very purpose of the Bill of Rights.

Brown v. Walker, supra, relying on several English pardon cases (161 U.S. at p. 599) held that transactional immunity operates "as a complete pardon for the offense to which it relates", and therefore satisfies the demands of the Privilege (161 U.S. at p. 595).[6]

The *Brown* Court equated statutory immunity with general amnesty, and observed that "the distinction between amnesty and pardon is of no practical consequence . . ." (161 U.S. at p. 601).

Now, in *Burdick v. United States,* 236 U.S. 79 (1915), relying on *United States v. Wilson,* 32 U.S. (7 Peters) 150, 160-161 (1833), this Court upheld the right of a witness to refuse a pardon because carrying with it an implicit admission of guilt.

It would seem to follow, albeit for different reasons, that if a witness may decline a pardon which, upon acceptance, would have displaced the Privilege, a witness may likewise refuse immunity.

Thus, the Privilege has been held to be a personal right of the claimant which only he can waive. (*Compare: Boykin v. Alabama,* 395 U.S. 238, 243-244 (1969); *Semble; Brookhart v. Janis,* 384 U.S. 1

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[6]"When the reason for the Privilege falls, the Privilege falls." *Ullman v. United States, supra,* 350 U.S. at p. 439.

(1966) (Waiver by attorney not imputable to defendant)).

In *Afroyim v. Rusk*, 387 U.S. 253 (1967), a majority of this Court held that the right of citizenship, expressly conferred on the citizen by the Constitution, could not be revoked or abrogated by the government without his consent (*Semble: Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)). So here, the Fifth Amendment Privilege ought not to be withheld from petitioners by mere legislative fiat, particularly where involuntary disclosure under statutory immunity leaves their liberty and status in greater jeopardy than it was when their right to remain silent was secured by the Fifth.

3. It Has Been Necessary to Judicially Contract the Dimensions of the Fifth Amendment Privilege in Order to Render Statutory Immunity Co-Extensive Therewith. Resulting in a Concomitant Loss of Liberty.

Furthermore, experience with transactional immunity demonstrates that even *its* breadth does not provide the witness protection co-extensive with the Fifth Amendment Privilege. The reason is clear: While acknowledging the *Counselman* mandate, courts have sometimes found it necessary to satisfy it by reducing the scope of the Fifth to fit the contours of the statutory immunity problem presented.

Thus, the *Brown* court refused to recognize infamy within the scope of the Privilege, stating that the impairment of a witness's good name as an incident of statutory immunity "is a penalty which it is reasonable he should be compelled to pay for the common good" (*Brown v. Walker, supra*, 161 U.S. at p. 606).

This view, long since rejected by this Court (See *Quinn v. United States, supra*, 349 U.S. at p. 164;

Ullman v. United States, supra, 350 U.S. at p. 426), was replaced in *Ullman* by the contention that the privilege protected only against exposure to a criminal charge (350 U.S. at p. 431). However, as Professor Mitchell Franklin conclusively demonstrates, in America and in the Old World the privilege against self-incrimination historically embraced also a privilege against self-infamy (Franklin, *The Encyclopédiste Origin of the Fifth Amendment,* 15 Lawyers Guild Review, 41 (*et seq.*) at p. 53 (1955); Franklin, *Infamy and Constitutional Civil Liberties,* 14 Lawyers Guild Review, 1-10 (1954)). The Fifth Amendment Privilege would therefore seem to extend its protection to loss of employment, reputation and other non-penal incidents of exposure. (*Cf. Garrity v. New Jersey, supra,* 385 U.S. 493; See also: *Quinn v. United States, supra,* 349 U.S. 155, 163-164 (acknowledging "the popular opprobrium which often attaches to exercise of the Privilege")). Indeed, isn't the tort of Invasion of Privacy constructed on notions which recognize the interest of the individual in suppression of his past mistakes?

Similarly, it has been held that the Privilege does not extend to protection beyond the claimant's own person (*Brown v. Walker, supra,* 161 U.S. at pp. 609-610). Yet, that view finds no support in the historical usage of the Fifth either. Udall expressly invoked the Privilege to avoid disclosure of the true author of the Martin Marprelate books.[7] Indeed, as Wigmore and Chafee recognized, the Privilege and other procedural rights were—and still are—frequently invoked by no-

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[7]*Chafee,* the Blessings of Liberty, Lippincott Press, 1956, at pp. 193-194 (quoting from 1 *Howe State Trials,* 1271 *et seq.*).

litical dissenters who believed their cause just and the offended law to be iniquitious.[8]

So too, Dean Griswold notes that the Privilege is often invoked out of loyalty to friends and associates whose conduct the witness sincerely believes to be as innocent as was his own.[9]

Moreover, it is doubtful that the suggestion advanced by Mr. Justice Brown that "every good citizen is bound to aid in the enforcement of the law", (*Brown v. Walker,* 161 U.S. at p. 600) in the context of political activity or employment, is either realistic or morally sound. It is more accurate to say that compulsory immunity statutes repress courage and incite cowardice and self-interest.[10] It is also more realistic to address that suggestion to those not accused of offending the law (See: *Miranda v. Arizona, supra,* 384 U.S. 436, at p. 461).

Indeed, the statute here, through the contempt power, lends itself to the punishment of those whom legislation could not otherwise reach—*e.g.,* political dissenters who refuse to disclose the names of their associates (Compare: *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462 (1958); *Shelton v. Tucker,* 364 U.S. 479, 485-487 (1960) with *Yates v. United States,* 355 U.S. 66 (1957); *Semble: Talley v. California,* 362 U.S. 60 (1961)).

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[8]Wigmore, *op. cit.*, pp. 313-314; Chafee, *ibid.*, at p. 207.

[9]*Griswold, The Fifth Amendment Today,* Harvard Univ. Press, 1955, at p. 16.

[10]Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion,* 10 Saint Louis U.L.J. 327 at p. 372 (1965).

4. The Right of Silence Guaranteed by the Fifth Amendment Should Not Be Re-Weighed Against a Congressional Objective, However Laudable, Save by the Amending Process Prescribed in the Constitution.

Although the Fifth Amendment Privilege confers absolute immunity, and demands that any substitute proffer equivalent protection (*Counselman v. Hitchcock, supra,* 142 U.S. at p. 586; *Albertson v. Subversive Activities Control Board, supra,* 382 U.S. at pp. 80, 81)), the law tends to be intolerant of absolute rights, at least when they are inconvenient to a legislative purpose deemed more compelling. Of course, mere expediency does not justify the abrogation of contitutional rights (*Johnson v. United States,* 333 U.S. 10, 15 (1948); *Mapp v. Ohio,* 367 U.S. 643, 658 (1961)). The Bill of Rights was not adopted as a convenience to the government, but as a deterrent to the historical and current propensity of government to transgress on the liberties of its citizens.

Therefore, the intimation in *Brown, supra* (161 U.S. at pp. 596, 600) that the policies underlying the Privilege may be so construed as to bring them in harmony with the legislative purpose of immunity—that is, the unobstructed furtherance of the administration of criminal justice—seems utterly irreconcilable with the purpose of the Bill of Rights.

Balancing of interests may be appropriate in some constitutional areas, as where two competing constitutional rights are at stake (*e.g.* free press v. fair trial: *Craig v. Harney,* 331 U.S. 367 (1947); *Bridges v. California,* 314 U.S. 252 (1941)).

But to balance constitutionally protected liberties against a legislative objective, however laudable the

latter may be, would soon reduce the Constitution to mere rhetoric. It follows that to favor a current and doubtlessly compelling state interest by simply disregarding interests which a constitutional amendment was originally enacted to protect accomplishes the same undesirable result.

As Mr. Justice Frankfurter reminds us in *Ullman, supra,* 350 U.S. at p. 427:

> "The founders of the nation were not naive or disregardful of the interests of justice."

But in framing and ratifying the Fifth Amendment, they struck a balance in favor of protecting the personal dignity and security of the individual (see: *Miranda v. Arizona, supra,* 384 U.S. at p. 460; Griswold, *ibid.* (n. 9, *supra*), at 7).

> "This guarantee against testimonial compulsion, like other provisions of the Bill of Rights 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed' Feldman v. United States (1944) 332 U.S. 487, 489." (*Hoffman v. United States,* 341 U.S. 479, 486 (1951)).

And there the balancing should end, unless and until the Privilege is amended by Constitutional means.

Even the *Brown* approach to Constitutional interpretation should require some showing—beyond that of obvious inconvenience—that the exercise of the Privilege is causally linked to a rising crime rate and government's inability to cope therewith, even with the tools legally available.

It is simply assumed by the immunity cases that the Right of Silence is an obstacle to effective law enforcement. But scientific and technological advances, the informer system, together with a limited right to conduct electronic surveillance *Katz v. United States,* 389 U.S. 347, 355-356 (1967), have equipped police with powerful (and frightening) weapons in the "war on crime". With such devices at their disposal, the Privilege would appear to be even more critical to the preservation of human liberty and dignity.

In the final analysis, the reasons for, and the benefit to justice and a democratic society accruing from enforcement of the plain words of the Fifth Amendment Privilege seem to warrant a reconsideration of a concept so at war with its historical imperative and tradition, namely, that any person can be forced to tell government what it wants to know—and hear.

II.

Use-Immunity Is Unable to Afford Protection to a Witness Co-Extensive With His Fifth Amendment Privilege, and Therefore §§6002-6003, on Their Face and as Construed and Applied Not Only Contravene the Self-Incrimination and Due Process Clauses of the Fifth Amendment, but They Also Pose a Substantial Threat to Civil Liberty.

1. Although Transaction Immunity Has Never Been Repudiated by This Court, While Use-Immunity Has Been, It Is Clear That Congress Intended to Substitute Use for Transaction Immunity.

In *Counselman v. Hitchcock,* 142 U.S. 547 (1892), this Court declared unconstitutional a federal use-immunity statute which compelled a witness to incriminate himself, while enjoining use of his testimony "in any criminal proceeding or for the enforcement of any penalty, fine or forfeiture."

Although the court found objectionable in that statute its failure to preclude also the use of the *fruits* of the compelled testimony (142 U.S. at p. 564), the thrust of its holding is upon other grounds, namely that—

> "No statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. [The immunity statute] does not supply a complete protection from *all* the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment to be valid *must afford absolute immunity against future prosecution for the offense to which it relates.*" (*Emphasis supplied*) (142 U.S. at pp. 585-586).

That principle has prevailed ever since as the standard for all federal immunity statutes. (See: *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 80 (1965); *Ullman v. United States,* 350 U.S. 422 (1956); *Brown v. Walker, supra,* 161 U.S. 591); and was so accepted by Congress until the decision of this Court in *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52 (1964). There, the majority concluded that incriminating testimony, or its fruits, obtained under the compulsory immunity statute of one jurisdiction could not be used in another.

In reaching this result, Mr. Justice Goldberg stated:

> "That in order to accommodate the interests of the state and federal governments in investigating

and prosecuting crime, the federal government must be prohibited from making any such use of compelled testimony and its fruits."

In footnote 18, p. 79, the Court observed that this policy was enforceable by means of the tainted evidence rules applicable to coerced confessions and other illegally obtained evidence.

In thus overruling *Knapp v. Schweitzer,* 357 U.S. 371 (1958), *Feldman v. United States,* 322 U.S. 487 (1944), and like authority for the contrary rule, the holding actually extended the dimensions of immunity nearer the peripheries of the Privilege. Far from overruling *Counselman v. Hitchcock, supra,* the majority invoked its language for support.

Ignoring the context of the "use and fruits" language, however, Congress seized upon it as expressing approval of use-immunity. The provisions at bar were incorporated into an omnibus anti-crime bill, euphemistically termed the "Organization Crime Control Act of 1970,"[11] and enacted on October 15, 1970 is substantially the same form as when introduced.[12]

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[11]Obviously, from the record in this case, its application is not limited to Organized Crime.

[12]That Title II was intended to confer "use" rather than "transaction" immunity is made abundantly clear by its legislative history. The Report of the House Judiciary Committee which accompanied the provisions at Bar through both Houses, expressly recites that Title II "will afford 'use' immunity rather than 'transaction' immunity," (U.S. Cong. Code & Adm. News, 91st Cong., 2nd Sess., No. 12, Nov. 20, 1970, at p. 4706).

The Committee's analysis of Title II adds that: "It is designed to reflect the use-immunity concept of *Murphy* [cite omitted here] rather than the transaction concept of *Counselman v. Hitchcock* [cite omitted here] (*Report, ibid.,* at p. 4716).

Finally, most, if not all, existing transaction immunity statutes were either repealed or converted into use-immunity language. (See, *e.g.* 18 U.S.C. 2424, Pub. L. 91-452, Title II, §226; 84 Stat. 930).

Federal Courts in at least two other jurisdictions have disagreed with the Court of Appeals below, concluding after extensive analysis of the authorities, that *Counselman v. Hitchcock, supra,* had not been reversed, and that the statute at bar was in conflict with its mandate that no immunity statute is valid unless the witness compelled to incriminate himself is protected from subsequent prosecution for the transaction about which he testified. (*In the Matter of Jack Korman and Robert W. Likas,* No. 71-1328, 7th Circuit, decided May 20, 1971, petition for cert. pending; *In Re Grand Jury Testimony of Joanne Kinoy,* 326 F. Supp. 407 (S.D. N.Y., 1971)).

2. The Historical Development of the Privilege Was Founded on Resistance to Testimonial Compulsion and Is Utterly Incompatible With the Use Immunity Concept.

The origins of the Fifth Amendment Privilege—as its language intimates—are steeped in the blood and agony of men put to inquisitional oaths and torture to compel self-accusation and other information sought by the State.

Compulsory incrimination in England can be traced to the Thirteenth Century when the Constitution of Otho adopted the general oath of calumny for clergy, providing that one could not deny under questioning what he knew to be true.[18]

Such oaths were administered only after presentment, but during the struggle between the Crown and the Church involving jurisdiction over such procedure,

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[18]8 Wigmore, Evidence, 3d Ed., McNaughton Rev., 1961, §2250, at p. 270. Some years later, the oath was extended to laymen who were compelled to answer truly. Failure to take the oath or answer under it was taken as a confession for which the party suffered excommunication. *Id.*, pp. 271, 273-274.

the ex-officio oath emerged as the State mechanism for investigating and suppressing heresy and other crimes.[14] The latter oath did not require accusation, but served the function of bringing testimony from a suspect upon which an indictment could be based.[15] Since an indictment was a prerequisite to prosecution, (although not in Udall's case)[16] the accused was required to plead thereto. If he refused, *peine forte et dure* was applied, a form of torture whereby heavy stones were placed upon his body until he plead or died.[17]

His plea was usually a confession that the accusation was true, for being still under oath, he dared not deny what his previous answers had produced.

Resistance to the oath developed slowly. By the end of the 16th Century, as Udall's case reveals, the right against compulsory self-accusation had been established in English common law courts in capital cases.[18]

It is appropriate to this case to pay a moment's respect to Udall's inquisition. A Puritan clergyman, Udall was summoned by the High Commission to answer questions concerning the Martin Marprelate books. He had not written them, but he knew who did, and he had used the same secret press to publish two anonymous tracts critical of the Anglican Bishops.[19]

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[14]*Ibid.*, pp. 273-276.

[15]Wigmore, *id.*, p. 276.

[16]*Chafee, The Blessings of Liberty,* 1st Ed., 1956, at p. 195.

[17]E. M. Morgan, *The Privilege Against Self-Incrimination,* 1949 Minn. L. R. 1, at pp. 5-10.

[18]*Ibid.*, p. 193; also, N. 32, p. 340.

"Udall: 'To swear to accuse myself *and others*, I think you have no law for it.

"Lord Anderson: 'That is true, if it concerned the loss of your life." (1 Howe St. Tr.)

[19]Chafee, *ibid.*, p. 193.

After Udall had refused for the better part of a day to identify the author, or "to be mine own tormentor", the Bishop of Rochester exclaimed:

> "Then you must go to prison, and it will go hard with you, for you must remain there until you be glad to take it."[20]

Udall was imprisoned, for six months, virtually incommunicado, until put to trial and convicted.[21]

Under the Stuarts, the ex-officio oath was transferred to the Star Chamber which had long been empowered to try most criminal offenses and impose any punishment, save death. It enforced the oath with great cruelty and arrogance.[22] Thus, in the case of Edward Peacham, a Puritan clergyman accused of High Treason, Bacon, the Attorney General, reports—

> "Upon these interrogatories, Peacham was examined before torture, between torture and after torture; nothing could be drawn from him, he still persisting in his obstinate and inexcusable denials and former answers."[23]

When Lilburn refused to incriminate himself before his inquisitors, he was ordered whipped and pilloried for refusing to take the oath "without which many offenses might go undiscovered and unpunished".

He was subsequently pardoned and awarded damages by Parliament on the ground that " 'the *sentence*

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[20]Chafee, *ibid.*, p. 194.

[21]Chafee, *ibid.*, p. 195.

[22]Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. R. 1, at p. 5. Chafee, *ibid.*, pp. 191-192; *Wigmore, op. cit.*, p. 281; Morgan, *op. cit.*, at pp. 5-6.

[23]Corwin, *op. cit.*, at p. 5.

was illegal and against the liberty of the subject' ".[24] (*Emphasis supplied*).

Although maintaining that he was not "bound to answer such [questions] as to do not belong to me", Lilburn did concede that he could be compelled to answer at trial.[25] Even so, by the time James II was deposed, the privilege had become so firmly established that it was thought unnecessary, or perhaps subversive of the principle to incorporate it in William's Bill of Rights.[26]

As testimonial compulsion was abolished in England, it became codified in France, and remained an instrument of oppression there until its abolition in 1789.[27]

These events were, of course, well known to the Constitutional framers, not only because their ancestors had fled inquisition, but because inquisitional practices were brought with them.

The Puritans, for example, who had been forced to take the odious oaths of supremacy and allegiance as a condition of departing for America, enacted in 1641 the Body of Liberties which, though prohibiting torture and oaths as a means of compelling self-accusation, permitted "tortures as [were not] barbarous and inhuman" after conviction until 1650, when all torture was finally abolished.[28]

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[24]Wigmore, *op. cit.*, at pp. 283-287; Chafee, *op. cit.*, pp. 203-205.

[25]Wigmore, *op. cit.*, at pp. 285-287.

[26]Wigmore, *op. cit.*, at pp. 288-289, 292.

[27]Wigmore, *ibid.*, pp. 290-293.

[28]Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. R. 763 (1935), at pp. 772-776; *Chafee, op. cit.* p. 188.

Following, and partly because of Bacon's Rebellion in 1677, Virginia banned compulsory self-incrimination.[29]

Even so, the device of contempt and imprisonment continued to be used by the Prerogative and other High Colonial courts to enforce hated trade laws in the colonies.

But by the American Revolution, torture had been uniformly abolished by the Colonial states.[30]

In the debates on the Federal Constitution, the few references to the Privilege against self-incrimination were invariably couched as a privilege against torture. So, in 1788, Patrick Henry opposed ratification of the Constitution, because it failed to proscribe torture, arguing, "But Congress may introduce the practice of torturing to extort a confession of the crime." Chafee suggests that "the desire to quiet such objections was one reason for putting the clause against self-incrimination into the Bill of Rights".[31]

3. Use-Immunity Endangers Liberty, Particularly in the Inquisitional Setting of a Grand Jury Proceeding Because Permitting Overly Broad Interrogation Power.

A principal, if not exclusive object of any immunity statute is governmental convenience in suppressing crime. It is to get at desired information more quickly and easily than by conventional methods.

Use-immunity services this objective most efficiently. Because he witness remains subject to prosecution for the transactions to which his testimony relates, use-

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[29]Pittman, *ibid.*, pp. 777-779.
[30]Pittman, *op. cit.*, 787-788.
[31]Pittman, *ibid.*, p. 788; Chafee, *op. cit.*, p. 188.

immunity thus broadens the compulsory immunity power while reducing the risk in obtaining information thereby.

The less the risk in securing information, the greater the pressure becomes to acquire all information by such methods.

To avoid jail and prosecution, a witness may not only tell what he knows, but what he believes his inquisitors want to hear (*cf. Flynn v. United States,* 130 F. Supp. 412 (S.D.N.Y., 1955)).

Under the use-immunity statute here there are no limits on government's investigative power, save the prosecutor's conscience and the grand jury's patience. He is unleased by the Act to roam at will across the gamut of the witness's defenses, opinions and any other subject that suits him.

It is difficult to see how this statutory scheme can be thought to be compatible with the Fifth Amendment Privilege where it invites revival of the inquisitorial system which gave rise to the Privilege, and whose mischief it was designed to prevent (*Counselman v. Hitchcock, supra,* 142 U.S. at p. 562).

4. Use-Immunity Furnishes the Government With a Sweeping Pre-Trial Discovery Tool Which Exposes the Witness to Dangers Prohibited by the Fifth Amendment and Which Use-Immunity Cannot Effectively Displace.

It follows from the broad interrogation power conferred by this use-immunity statute that as it bestows great benefits upon government, unlike transaction immunity, it enlarges to that extent the peril of the witness. It hardly need be added that such result not only denies protection co-extensive with the Fifth Amend-

ment Privilege, but contradicts even the stated purpose and effect of the use-immunity statute at bar. Thus, under this statute, the government is at liberty to conduct a free-wheeling discovery of the witness's defenses, exploring for its weaknesses and its hopes (*i.e.*, witnesses), although the witness has no such corresponding right, even at trial. (See: Jenks Act, 8 U.S.C. §3500; Rule 16, *Rules of Criminal Procedure*).

The proceedings being secret, the immunized witness has neither his counsel—nor the Court—to protect him from a relentless, overbearing interrogation (*cf. Berger v. United States*, 1934, 295 U.S. 78).

The witness is probably unprepared, especially if not informed of the subject matter of the inquiry. Likely too, he is unfamiliar with either law or court rooms, and is apprehensive concerning his fate. In sum, he may be "badly frightened" and "lost in fear and confusion"[32] and in the end, give contradictory and mistaken answers. As a result, he may fear to take the witness stand in his own defense lest he be subsequently prosecuted for perjury.

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[32]Dean Erwin Griswold, *The Fifth Amendment Today*, Harvard Univ. Press, 1955, at p. 20, explaining why such a witness "might turn to the privilege as a means of sanctuary from the situation which he feels himself incompetent to handle".

See also: *Wilson v. United States*, 149 U.S. 60, 66 (1893), wherein this Court observed:

> "It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing other and attempting to explain transactions of a suspicious charater, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand."

This possibility may have been anticipated by the prosecutor as it was by the Ninth Circuit Court in *Groshart v. United States,* (9th Cir., 1968) 392 F. 2d 172, at p. 180, when it noted:

> "Surely, too, we should not encourage law enforcement officers to interrogate one in violation of his constitutional rights with the sole purpose of obtaining evidence for use in impeaching him should he testify at a future trial or for the purpose of thereby preventing a defendant from taking the stand in his own defense."[33]

5. The Use-Immunity Statute at Bar, on Its Face and as Applied, Not Only Permits, but Encourages Abuse of Its Overly Broad Interrogation Power by Withdrawing From the Courts the Power to Control or Interfere With Its Exercise.

However, it is not only the possibility of a perjury prosecution which warrants the protection of the Privilege; it is also the unchecked investigative power which the use-immunity permits and the statute here encourages. The friendless, inquisitorial atmosphere of the grand jury room in which the witness is compelled to speak is akin to the "isolated setting of a police station" (*Miranda v. Arizona, supra,* 38 U.S. 436, 461),

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[33]The factual setting of this case should not be overlooked. Petitioners were summoned by a grand jury and there ordered to admit violations of the Selective Service laws or go to jail.

From the questions asked, a reasonable inference can be drawn that the prosecution already possessed independently acquired evidence—perhaps all that was needed for conviction, except *intent.*

A vigorous cross-examination of petitioners might well have cemented them into positions which subsequent recollection revealed to be erroneous. Yet, the prosecutor could enter the trial with some confidence that the petitioners would retain their prior testimony or stay off the witness stand.

and to the star chambers of a one-man-one-judge grand jury (*In re Oliver*, 333 U.S. 257 (1948); *In re Murchison*, 349 U.S. 133 (1955)). While the form of due process is here maintained, the statute at bar withholds its substance, leaving the immunized witness as unprotected from abusive, irrelevant and unconstitutional interrogation as was the accused in *Oliver*, *Murchison* and *Miranda*.

§6003 of the Act at bar *requires* the United States District Court to issue an order compelling a witness to incriminate himself under the use immunity provisions of §6002 upon a showing by the United States Attorney that 1) he deems the witness's testimony to be necessary to the public interest; 2) the witness has invoked his Fifth Amendment Privilege, or is likely to do so; and 3) the Attorney General, or a designated subordinate, has approved of it.

The Prosecutor is not compelled by the statute to disclose a *reasonable*, or any other basis for his belief that the witness's testimony is in the public interest. Thus, neither the witness nor the Court may know in advance of the investigation whether the basis for intruding upon the witness's privacy, and searching out his past and present activities for criminal offenses, meets the standards of the Fourth and Fifth Amendments. (Compare: *Marcus v. Search Warrants of Property*, 367 U.S. 717 (1961); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Boyd v. United States*, 116 U.S. 616 (1886).)

Nor does the statute, either on its face or as applied, compel the United States Attorney to show even the *subject matter* of his investigation, so that the witness—and ultimately, the Court—may determine the

scope of the inquiry, and hence, the relevancy of the questions put to him.

Indeed, the limited showing required by §6003(b) was, in the District Court below, set forth in conclusionary form, in substantially the language of that section. The Government contended that no more was required (App. 17-18).[34] Over the defense objections just stated (*inter alia*)[35] the Court, with some hesitancy (App. 38-39), signed the compulsory immunity order (App. 42, 57, 61).

The House Committee Report on Title II (H.R. No. 91-1188, 91st Cong. 2d Sess., 6/15/70 [Accompanying H.R. 11157] states (at p. 13)):

> "The Court's role in granting the [compulsory immunity] order is merely to find the facts on which the order is predicated. The statutory scheme is 'shall'. *Review that second judges prosecutive* discretion is not authorized. Compare *In re Bart*, 304 F. 2d 631 1962)." (***Emphasis supplied***).

In citing *Bart, supra,* it is clear that the statutory framers intended to overrule it. For *In re Bart, supra,* held a government application made under the old immunity statute to be deficient because failing to show factually the relevancy of the grand jury's investigation to the national security which, under that statute, was requisite for granting immunity (*In re Bart, supra,* 30 F. 2d at p. 636).

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[34]"Now, Mr. Manes says the statute makes this court ministerial in its function . . . The statute makes it very plain that the court's function *is* ministerial. The court is not informed and cannot be so informed as the grand jury or the U.S. Attorney . . . and the court simply doesn't have that responsibility nor the time." (App. 17-18).

[35]See: App. 9-10, 15-16.

The restraint of relevancy is usually available to deter misuse of investigative power (*Compare: Watkins v. United States,* 354 U.S. 178, 205-206 (1957); *Russell v. United States,* 369 U.S. 749 (1962); *In re McElrath,* 248 F. 2d 612 (1957)).

But relevancy as a ground for limiting inquiry to particular transaction for which immunity was authorized seems to have been extirpated from the statute at bar. For under this statute, use-immunity may apparently be conferred for *any* transaction or matter; and the judicial power to restrain an overly broad investigation which was permitted before a finding of contempt had been made (*See: Cobbledick v. United States,* 309 U.S. 323, 328 (1940); *In re McElrath, supra,* 248 F. 2d at p. 616; *In re Bart, supra,* 304 F. 2d at p. 637), appears to have become impertinent even in a contempt proceeding. Thus does this statute transgress even upon the judicial function.[86]

6. The Immunity Afforded the Statute at Bar Is Illusory Notwithstanding That Government May Have the Burden of Proving Its Evidence Against an Immunized Witness Was Independently Acquired.

While it is true that in the prosecution of a use-immunity witness for a transaction to which his testimony relates the Government probably has the burden of proving that its evidence has been independently acquired (*Murphy v. Waterfront Commission of New York, supra,* 378 U.S. at p. 79 N. 18), the protection of such a rule is largely illusory.

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[86]See: Rogge, *New Federal Immunity Act and the Judicial Function,* 45 Cal. L. R. 109, 133 (1957).

As Congressman William F. Ryan of New York points out in his minority opinion to the House Judiciary Committee's Report:[37]

> "It is not difficult to mask evidence so that it appears to have been developed independently of the immunized witness's testimony or information."

Information extracted from the accused in the grand jury room is easily implanted by an investigator in the mind of a prosecution witness as independent recollection, or may furnish leads to a site or event at which independent witnesses or evidence may be found.

How, indeed, does even a conscientious prosecutor or law enforcement officer, upon exposure to compelled testimony, once removed, know or recall with accuracy the point at which his allegedly independent evidence has become tainted? And consider the obvious possibility, suggested somewhat by the record in *DeLorenzo v. United States,* 151 F. 2d 122 (C. A. 2, 1945), where information from the lips of the accused, though already known to, but not understood by the prosecutor, supplies the key which makes it comprehensible and prosecution possible.

Thus, notwithstanding a prosecutor's honest motive and good faith, use-immunity may leave the witness "much worse off in regard to the danger of prosecution and conviction than if he had remained silent".[38]

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[37]H.R. Report No. 91-1188, 91st Cong., 2nd Sess., [Accompanying H.R. 11157], p. 39 at p. 42.

[38]Mansfield, *The Albertson Case: Conflict between the Privilege Against Self-Incrimination and the Government's Need for Information,* 1966 Sup. Ct. Rev. 103, 165.

7. Use-Immunity Cannot Be Co-Extensive With the Protection Afforded by the Fifth Amendment Privilege Because Dependent for Its Implementation Upon Rules Which Would, in Effect, Permit Conviction of the Accused Based on Evidence From His Own Mouth.

The Fifth Amendment Privilege against Self-Incrimination, perforce its history and its terms, was aimed at preventing government from *compelling* testimony, never with safeguarding its fruits from future use in criminal cases. Only after the right of silence had been established,[39] *Brown,* and later *Ullman,* conceived its object as protecting a witness from being "brought by means of his own evidence within the penalties of the law."[40] But transaction immunity, it is clear, was deemed the minimum constitutionally acceptable consideration for a witness's testimony. While *Brown* refused to extend *Counselman,* neither *Brown,* nor any case since has rejected its holding that use-immunity was not an adequate substitute for the Privilege.[41]

After all, if immunity is to be thrust upon an unwilling witness in exchange for his testimony, the government must compensate him justly for loss of his constitutional right of silence.

It is not enough for government to seize his testimony and promise never to use it against him. For such

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[39]"A history of immunity acts . . . shows such acts began almost as soon as the right of silence established itself." Rogge, *Compelling the Testimony of Political Deviants,* 55 Mich. L. R. 375, 383 (1955).

[40]*Brown v. Walker, supra,* 161 U.S. at p. 600, quoting with approval *Reg. v. Boyes,* 1 Best and S. 311, at p. 321. See also, *Brown,* at pp. 605-606; *Ullman v. United States, supra,* 350 U.S. at p. 439.

[41]Not even *Murphy v. Waterfront Commission of New York Harbor, supra,* 378 U.S. 52, although the immunity law there in question was transactional.

a promise must inevitably be broken to the hope because dependent on rules which render possible—even probable—the conviction of a use-immunity witness on evidence derived from his mouth.

This Court has already intimated that the exclusionary rules applicable to illegally obtained evidence are relevant to the immunity field. (*United States v. Blue,* 384 U.S. 251, 255 (1966); *Murphy v. Waterfront Commission of New York Harbor, supra,* 378 U.S. at p. 79, n. 18).

Although exclusionary rules are fashioned to deter future violations of constitutional rights (See: *Elkins v. United States,* 364 U.S. 206, 217 (1960), "exceptions" have crept into them which, applied to the use-immunity field only further erodes the Privilege, and even repudiates the committment of use-immunity and the intent of its proponents.

California, for example, holds that the fruits of an *involuntary confession* are not excludable if they *would have been* discovered by police from information already in their possession or independently acquired (*People v. Ditson,* 57 Cal. 415, 20 Cal. Rptr. 165 (1962) (cert. denied); *People v. Chapman,* 261 Cal. App. 2d 149, 67 Cal. Rptr. 601, 613 (1968); *People v. Carlin,* 261 Cal. App. 2d 30, 67 Cal. Rptr. 557, 561 (1968)).

A similar rationale was applied to an illegal entry in *Wayne v. United States,* 318 F. 2d 205, at p. 209 (1963), where the court concluded that because the evidence [*i.e.,* the corpus] would sooner or later have been discovered [albeit not necessarily in the defendant's home] "the necessary causal relation between the illegal activity and the evidence sought to be excluded is lacking in this case." (p. 209).

The beginnings of that formulation may be seen in *United States v. DeLorenzo, supra,* 151 F. 2d 122, where the court refused to reverse a conviction resting on testimony given before a Congressional Committee under transactional immunity on the ground that the facts testified to, and used against the appellant in his trial, were known to the chairman before disclosure (See also: *Cohen v. United States,* 201 F. 2d 386, 391 (C.A. 9, 1953)).

Nardone v. United States, 308 U.S. 338, 341 (1939) and *Wong Sun v. United States,* 371 U.S. 471, 487-488 (1963). established another "exception" whereby evidence derived from illegal police conduct may be nevertheless admissible where the taint is *attenuated.*

Nardone went so far as to require proof "that a *substantial* portion of the case against [the defendant] was a fruit of a poisonous tree" (p. 342).

The *Nardone* exceptions appear to have been anticipated by *Heike v. United States,* 227 U.S. at p. 144. There, the Court suggested that immunity from prosecution was available only if there was *substantial* prior testimony on the subject for which he is subsequently prosecuted (See also: *United States v. Lumber Products Assn., Inc., supra,* 42 F. Supp. at 915).

Again, where transactional immunity cases involve solely questions of law, which may ordinarily be resolved by reference to a transcript of the immunity proceeding, the critical question in use-immunity cases is one of fact, namely, whether evidence used against the witness was derived from independent sources.

The difficulty thus imposed on a witness-accused to disprove the government's contention is obvious. Nor is it made easier by procedural rules which deny him

access to investigation reports, statements of witnesses and other government records which may shed light on the question (See: Rule 16, Rules of Criminal Procedure, Title 18, U.S.C.; 18 U.S.C. §3500).

Moreover, the government's claim of independently acquired evidence will usually turn on the credibility of its witnesses, probably for the most part, law enforcement personnel. A finding in favor of the government on this or any other issue of fact, where there is evidence to support it, is, of course, binding on a reviewing court (See: *Rogers v. Richmond, supra,* 365 U.S. at p. 546; *Lisenba v. California,* 314 U.S. 219, 239).

True, it is not unusual for constitutional claims to rest on fact questions. However, the issue here is whether use-immunity is co-extensive with the Fifth Amendment Privilege, which provides absolute protection from the use of incriminating evidence against the witness furnishing it. Theoretically, transactional immunity grants equivalent protection by barring prosecution based on tainted evidence, and providing an avenue of appeal for the enforcement of this protection.

But use-immunity makes no such claim, because the possibility of absolute protection, even theoretically, is too remote. Decisions which turn on fact questions are too susceptible of human error to allow the constitutional protection hinging on it to be characterized as absolute.

8 Concluding Statement.

What emerges from the application of use-immunity is that the witness is heavily, if not entirely, dependent on the honesty and good faith of government officials, which, it has been said, poses no hazard to his rights.[42]

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[42]Mr. Justice White, concurring, *Murphy v. Waterfront Commission of New York Harbor, supra,* 378 U.S. at pp. 103-104.

Such an inference seems irrelevant in an adversary system, and in any event, is inconsistent with judicial experience which has found it necessary to exclude evidence to deter police lawlessness (*Mapp v. Ohio, supra,* 367 U.S. 643; *Rogers v. Richmond,* 365 U.S. 534 (1961); *Nardone v. United States, supra,* 308 U.S. 338), as well as to correct injustice caused by overzealous prosecutors (See: *Communist Party v. Subversive Activities Control Board,* 351 U.S. 115; and *Measosh v. United States,* 352 U.S. 1 (1956) [use of perjured testimony]; *Mooney v. Holohan,* 294 U.S. 103 (1935); *Brady v. Maryland,* 373 U.S. 83, 86-87 (1963), and cases cited thereat [non-disclosure of perjured or framed evidence]; *Berger v. United States,* 295 U.S. 78 (1934) [improper argument by prosecutor]).

In the final analysis, one has to ask why the government should seek to compel testimony, and then prosecute for the offense concerning which such testimony was elicited? If the evidence he gives cannot be used against the witness, at least theoretically, why compel his testimony, and then, as here, prosecute?

Agreed, a criminal should not be allowed to escape punishment for his wrongdoing. But if that is the answer offered, it only begs the question. The desire to punish, to bring to brook, should not be confused with compelling confessions which, after all, is what the Privilege is supposed to prevent.

It would seem more appropriate to put government to its choice: Either prosecute, and forego the accused's testimony, or compel it, and forego prosecution (Semble: *Rosiaro v. United States,* 353 U.S. 53, at pp. 61, 65, n. 15 (1957); *United States v. Coplan,* 185 F. 2d

629, 636-639 (C.A. 2, 1950); *United States v. Andolschek*, 142 F. 2d 503, 505 (C.A. 2, 1944)).

The statute at bar imposes no such election on the government; contrarily, under its aegis, government gets much, and gives up little.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgments of the Courts below should be reversed.

Respectfully submitted,

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No. 70-117

In the Supreme Court of the United States

OCTOBER TERM, 1971

CHARLES JOSEPH KASTIGAR AND MICHAEL GORDEAN STEWART, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General,
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Dixon, *Comment on Immunity Provisions*, National Commission on Reform of Federal Criminal Laws, Working Papers, Vol. II 30
Levy, *Origins of the Fifth Amendment* (1968) 10
McCormick, *Evidence* (1954) 19
Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1–23 (1949) 10
Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 St. Louis U.L.J. 327 (1966) 15
8 Wigmore, *Evidence* (McNaughton Rev. 1961) 11, 15

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–117

CHARLES JOSEPH KASTIGAR AND MICHAEL GOREAN STEWART, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 71–76) is reported at 440 F. 2d 954.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1971 (A. 69–70). The petition for a writ of certiorari was filed on April 8, 1971, and was granted on May 17, 1971 (A. 77). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a grand jury witness, claiming the privilege against self-incrimination, may constitutionally be compelled to testify under an immunity statute which bars any use of the compelled testimony or its fruits but does not bar prosecution of the witness regarding transactions about which he may testify.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 201(a) of the Organized Crime Control Act of 1970, 84 Stat. 927, 18 U.S.C. 6002, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly

derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[1]

STATEMENT

On February 11, 1971, the United States District Court for the Central District of California adjudged petitioners in civil contempt for refusing to answer questions before a grand jury after having received grants of immunity under Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 6002. The court committed each to imprisonment until such time as he answered the questions or the term of the grand jury had expired (A. 49–51). Following an expedited appeal, the court of appeals affirmed on March 10, 1971 (A. 69–76).

The relevant facts are as follows: On September 9, 1970, petitioner Kastigar appeared pursuant to subpoena before a grand jury in the Central District of California and refused to answer questions on the ground that his answers might tend to incriminate him (A. 58). Thereafter, subpoenas were issued for the appearance of both petitioners before the grand jury on February 4, 1971. Before their appearance, the government, noting that Kastigar had refused to testify and that Stewart was likely to refuse to testify on the basis of the privilege against self-

[1] 18 U.S.C. 6003 provides the method for securing the immunity.

incrimination, applied to the district court for orders directing each to answer questions and produce evidence before the grand jury under the immunity provisions of 18 U.S.C. 6002 and 6003. This application was "made in good faith" and with the approval of the Attorney General (A. 54–56, 58–60).

Petitioners opposed the order primarily on the ground that the statutory immunity provisions were invalid under *Counselman* v. *Hitchcock,* 142 U.S. 547, in that they were not coextensive with the Fifth Amendment privilege against self-incrimination, because they granted "use" rather than "transactional" immunity (A. 5–8). Following a hearing, the district court rejected this contention (A. 30–37). It ordered petitioners to appear before the grand jury and answer its questions under the statutory grant of immunity (A. 57, 61).

On February 11, when petitioner Kastigar appeared before the grand jury, the following colloquy ensued (A. 48):

> Q. Mr. Kastigar, as we told you before, the Grand Jury has received a great deal of information concerning a situation in which you had orthodontic braces placed on your teeth just prior to reporting for military induction and had them removed just after a word [sic] by a Dr. Bernard Bender, with offices at 8328 De Soto in Canoga Park.
>
> Would you tell us, please, how that came about?

A. I'm sorry, I decline to say anything about that on the basis that my answer may tend to incriminate me and on the advice of counsel.

* * * * *

Q. Do you intend to take that same position with respect to all questions concerning this subject matter, so we don't waste your time or our time?

A. I intend to take the Fifth Amendment.

On the same day, petitioner Stewart also appeared before the grand jury and the following colloquy occurred (A. 48–49):

Q. Would you please tell us how it came about that you went to Dr. Bender for the so-called dental services which I described?

A. Okay. On that I will have to respectfully decline to answer on the ground it may incriminate me.

Q. You have been told here in court by the judge that you are under the immunity statute and nothing you say can be used against you?

A. I understand.

Q. Are you refusing to answer on any other grounds or for any other reason, other than self-incrimination?

A. I will use self-incrimination.

Thereafter, petitioners were brought before the district court. Each persisted in his refusal to answer any questions. The court then found both guilty of civil contempt and sentenced them to imprisonment until they answered the questions or for the term of the grand

jury (A. 49–51). In affirming, the court of appeals expressed the view that under recent decisions of the Court—primarily *Murphy* v. *Waterfront Commission*, 378 U.S. 52—transactional immunity is not essential to meet Fifth Amendment requirements and that the broad use immunity granted by 18 U.S.C. 6002 is sufficient to satisfy the protection afforded by the privilege against self-incrimination (A. 71–76, particularly at 72–75).

ARGUMENT

INTRODUCTION AND SUMMARY

This case arises from the recent immunity provisions enacted by Congress in the Organized Crime Control Act of 1970 (18 U.S.C. 6002, 6003). These provisions were enacted to replace numerous witness immunity statutes, *e.g.*, 18 U.S.C. 2514, with a single general statute. Under the repealed statutes, a witness compelled to testify could not be prosecuted either in federal or state court for or on account of any transaction, matter or thing, concerning which he had testified (*i.e.*, he received transactional immunity). Under the terms of the generally applicable 1970 Act whenever a witness is compelled to testify, such testimony or its fruits may not be used against him in either a federal or state prosecution (*i.e.*, use and derivative use immunity).

The issue squarely posed here is whether the scope of the immunity provided by the 1970 Act is sufficient to compel a witness to give otherwise incriminating information—whether, in short, it provides an immunity coextensive with the protection afforded by the

self-incrimination clause of the Fifth Amendment. Thus "the important question" left undecided last Term in *Piccirillo* v. *New York*, 400 U.S. 548,[2] is presented by this case.[3]

At bottom, two basic principles are involved in resolving the issue. On the one hand, at the core of our judicial system is the settled notion that "the public has the right to every man's evidence."[4] It is self-evident that without the ability to compel the testimony of every citizen as to matters within his knowledge, law enforcement officials would be severly hampered in the prosecution of those who violate the criminal laws. On the other hand, just as firmly embedded in our jurisprudence is the Fifth Amendment privilege that "no person * * * shall be compelled in any criminal case to be a witness against himself." This Court has repeatedly recognized that this constitutional provision "reflects many of our fundamental values and most noble aspirations" *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55; *Ullmann* v. *United States*, 350 U.S. 422, 426.

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[2] The same legal issue is posed in *Zicarelli* v. *New Jersey State Commission of Investigation*, No. 69–4, this Term.

[3] With four Justices dissenting, the writ was dismissed in *Piccirillo* as having been improvidently granted, because the New York statute there involved had been construed by the New York Court of Appeals as granting "transactional" immunity.

[4] This phrase was referred to in *Piemonte* v. *United States*, 367 U.S. 556, 559 n. 2, as one which "cannot be too often recalled." See also *Ullmann* v. *United States*, 350 U.S. 422, 439 n. 15; *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 94–95 (concurring opinion).

Sometimes a witness has knowledge about the criminal activities of others, yet is himself involved in the same or in other criminal activities. Congress and the states have recognized that in these situations it may be impossible to prosecute others without the testimony of the person who is asserting the privilege against self-incrimination. Immunity statutes recognize and seek to avoid this collision: they rest on the premise that a witness may be compelled to answer questions—despite a claim of the privilege against self-incrimination— but only if the statutory protection against his prosecution is coextensive with the privilege against self-incrimination. What is to be resolved here, therefore, is whether "transactional" immunity is necessary to meet constitutional requirements. If that is true, the 1970 immunity provision is invalid.

In Point I we argue that no such sweeping reading of the privilege is required to give it the significant place it holds in the hierarchy of constitutional values. We urge that neither the purposes served by the privilege nor the decisions of this Court require the expansive reading attributed to the privilege by petitioners. Indeed to adopt such a reading would undercut the interests of society in the prosecution of crime without any justifiable benefit accruing to the individual invoking the privilege. Such a reading would also be inconsistent with the import of *Murphy* v. *Waterfront Commission,* 378 U.S. 52, and other recent decisions of this Court.

We submit that the earlier transactional immunity statutes passed by Congress were designed to comply with dictum in *Counselman* v. *Hitchcock*, 142 U.S. 547, and confer a broader grant of immunity than is constitutionally required. After extensive consideration which culminated in the 1970 Act, Congress reached the considered legislative judgment that the competing interests of the public's right to information and the individual's constitutional right not to incriminate himself are reconcilable without immunizing a witness entirely from prosecution for an offense for which his testimony is not needed and will not be used in any way against him. In short, it concluded that the dictum in *Counselman* was just that and not a directive of constitutional proportions. In making that judgment, Congress relied primarily on this Court's decision in *Murphy* v. *Waterfront Commission, supra.* The present statute is a considered effort by Congress to assure, in a constitutional manner, the flow of information without granting a reward to those who would use the Fifth Amendment as a sword rather than a shield. *Harris* v. *New York*, 401 U.S. 222.

Finally, we argue that there are practical situations in which a "use" rather than a "transactional" immunity statute will serve the interests of society without, in any way, cutting down on the protections to which a witness is entitled under the privilege; and that the courts can fairly administer the restriction on use imposed by Section 6002.

In Point II we contend that petitioners have no basis for the contention that the Fifth Amendment bars the enactment of any immunity statute at all.

I

THE USE IMMUNITY STANDARD ADOPTED BY CONGRESS IN 18 U.S.C. 6002 IS COEXTENSIVE WITH THE PROTECTION AFFORDED BY THE PRIVILEGE AGAINST SELF-INCRIMINATION

The witness immunity statute, 18 U.S.C. 6002, involved in this case provides that if a witness, claiming the privilege against self-incrimination, is compelled to testify, "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used" against him in a federal or state criminal prosecution. In urging that this provision is coextensive with the privilege against self-incrimination, we begin with an analysis of the purposes underlying the privilege and the critical decisions of this Court which have dealt with the immunity issue.

A. "USE" AND "DERIVATIVE USE" IMMUNITY IS FULLY CONSONANT WITH THE PRIVILEGE AGAINST SELF-INCRIMINATION

1. *The policies underlying the privilege against self-incrimination.*

The circumstances which prompted the adoption of the Fifth Amendment have been detailed in opinions of this Court and the writings of commentators. See, *e.g.*, *Ullmann* v. *United States*, 350 U.S. 422, 428; *Brown* v. *Walker*, 161 U.S. 591; *Quinn* v. *United States*, 349 U.S. 155, 161–162. See also Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1–23 (1949); Levy, *Origins of the Fifth Amend-*

ment (1968); 8 Wigmore, *Evidence,* § 2250, pp. 267–295 (McNaughton Rev. 1961).[5]

This history reveals that the privilege was aimed at the evils of the Inquisition and the Star Chamber. It was designed to prohibit the government from using a man's compelled testimony to punish him. It was not, however, designed to allow a witness to use the privilege to shield others or to relieve himself from the central duty to give evidence. Indeed, as already noted (*supra,* p. 7), at the very essence of our judicial system is the proposition that "the public has the right to every man's evidence." The basic thrust of the Fifth Amendment was to carve out an exception to this testimonial duty to protect a variety of interests personal to the witness himself which were important enough to overcome his testimonial obligation. This Court summarized the complex of values protected by the privilege which justified this exception in *Murphy v. Waterfront Commission, supra,* 378 U.S. at 55, as follows:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our

[5] An extensive analysis of the development of the privilege in England and its reception in this country is contained in the Brief for the National District Attorneys as Amici Curiae in *Zicarelli v. New Jersey State Commission of Investigation*, No. 69–4, this Term, pp. 11–19. That brief also contains, pp. 37–39, a summary of the modern British and Canadian approaches to immunity, indicating that the relevant statutes generally provide less broad protection than that afforded by Section 6002.

> sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald,* 233 F. 2d 556, 581–582 (Frank, J. dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States,* 349 U.S. 155, 162.

See *Brown* v. *Walker,* 161 U.S. 591, 600; *Malloy* v. *Hogan,* 378 U.S. 1, 8; *Feldman* v. *United States,* 322 U.S. 487, 500 (dissenting opinion of Mr. Justice Black). That the privilege is not meant as a tool to shield others has found precise expression in other opinions of this Court. See, *e.g., Rogers* v. *United States,* 340 U.S. 367, 371, where this Court stated:

> Furthermore, the decisions of this Court are explicit in holding that the privilege against self-incrimination "is solely for the benefit of the witness," and "is purely a personal privilege of the witness."

Again in *Brown* v. *Walker, supra,* 161 U.S. at 597, 600, this Court noted that the privilege is "not for [the protection] of other parties," and is not "for the real purpose of securing immunity to some third person."

In short, the central principle that derives from the Fifth Amendment cases is that a citizen who is called upon to give testimony or information to the government need not incriminate *himself*. The privilege against self-incrimination confers a right to require the government to "shoulder the entire load"—to adduce the evidence against the accused without compelling him to provide the basis of his own guilt. At the same time, the witness has no proper claim to withhold information about others.[6] Indeed, he has a duty to disclose and is "bound to aid in the enforcement of the law." *Brown* v. *Walker, supra,* 161 U.S. at 600.

These basic purposes are not furthered by construing the privilege so broadly that society would be prohibited from requiring a person to testify even though that nothing he says or derives from what he says can be used against him. So long as he has that protection, the rights guarded by the privilege are fully protected. There is no reason that the state, at the cost of effective law enforcement should be required to give the witness any more—it need not provide him immunity that forecloses prosecution in situations where it has not been aided in any way by words out of his own mouth.

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[6] The First Congress, which proposed the Bill of Rights, thus enacted a statute making misprision of treason and felony a crime. 1 Stat. 112, 113. The legal duty to report the commission of known felonies was thereby imposed on any person who had learned that such crime had been committed.

A witness compelled to testify under a statute is given immunity coextensive with the privilege when the witness is placed in the same position with respect to a criminal prosecution after his testimony, as he was before. When the government is precluded from making any use of the testimony whatsoever, either directly or indirectly, the witness is, for Fifth Amendment purposes, in the same position as before he testified. The privilege against self-incrimination has been literally complied with. See the concurring opinion of Mr. Justice White in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 100–101. This is precisely what the present immunity statute achieves by its prohibitions against direct and indirect use.

Before its legislative history, which makes this purpose plain, is discussed (see infra, pp. 27–32), it is necessary to examine the pertinent decisions of this Court. In our view, except for "illusory support in a dictum" in *Counselman* v. *Hitchcock,* 142 U.S. 547 (Mr. Justice White concurring in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 93), no contrary rule is required by these decisions; indeed the more recent holdings support the proposition that a use restriction standard of the kind involved here satisfies the requirements of the privilege against self-incrimination.

2. *The decisions of this Court.*

An analysis of the decisions of this Court regarding the necessary scope of immunity statutes must commence with *Counselman* v. *Hitchcock,* 142 U.S. 547, for that decision provided the underpinnings for the federal transactional immunity statutes which were enacted prior to the adoption of the 1970 Act. In that

case an immunity statute (Act of February 25, 1868, Rev. Stat. § 860) [7] provided in relevant part:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture. * * *

Counselman was called before a federal grand jury which was investigating alleged illegal rebates by officers and agents of various railroads including the Chicago, Rock Island and Pacific Railroad Company and the Chicago, Burlington and Quincy Railroad Company. He testified that he was in the grain business and that he principally shipped grain over the Rock Island and Burlington railroads. He refused to answer, on grounds of self-incrimination, questions whether he had obtained a rate other than the tariff rate for transportation of grain from railroads generally, and from the Rock Island railroad particularly, from points outside of Chicago. He also declined to

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[7] In 1857 Congress first adopted an immunity statute which protected against prosecution for any matter about which any witness testified before Congress. Act of January 24, 1857, Ch. 19, 11 Stat. 155. An abuse under this statute led to its repeal. See Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 St. Louis U. L. J. 327 (1966).

The primary approach of the states in the Nineteenth Century was that of a use-restriction immunity. See 8 Wigmore, *Evidence* (McNaughton Rev. 1961); see also, *Ullmann* v. *United States*, 350 U.S. 422, 438.

answer questions concerning his knowledge of transportation by the Rock Island railroad at less than the established rate. When he persisted in his refusal, he was held in contempt. He then filed a petition for a writ of habeas corpus in the Circuit Court for the Northern District of Illinois. That court dismissed the writ, rejecting an argument that under the statute, Counselman might disclose facts which would open up sources of information to the government whereby it might obtain evidence to secure his conviction. The court said (44 Fed. 268, 271):

> If, through threats or fear of violence, a man confesses that he has committed murder, and states who was present at the time, and where the weapon and the dead body may be found, and he is afterwards put on trial for the offense, he cannot be confronted with his confession; but the person who saw the crime committed is a competent witness, although the prosecutor might never have known there was such a witness but for the confession, and it may be shown by others that the weapon and dead body were found where the defendant said they could be found.

This Court reversed. It specifically pointed out that the vice of the statute before it was that it "could not, and would not, prevent the use of [a witness'] testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding" or other derivative use of his direct testimony given under compulsion of the statute (142 U.S. at 564). It then reviewed the decisions of various state courts dealing with the question of derivative use. It

considered, *inter alia,* the decisions in *Emery's Case,* 107 Mass. 172, and *Cullen* v. *Commonwealth,* 24 Grattan 624 (Va.), which found such use statutes unconstitutional because they permitted derivative use of the witnesses' testimony (142 U.S. at 571–576). It also analyzed a New Hampshire case, *State* v. *Nowell,* 58 N.H. 314, which upheld a statute that forbade both the use of testimony against the witness and his prosecution for any offense disclosed by him (*id.* at 577–578). After extended discussion, the Court concluded that the federal statute was unconstitutional. It said, quoting in part from *Emery's Case* (142 U.S. at 585):

> It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection without using his answer as direct admissions against him."

After striking that theme, the Court continued (*id.* at 585–586):

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that pro-

> hibition. In view of the constitutional provision, a statutory enactment, to be valid, *must afford absolute immunity* against future prosecution for the offence to which the question relates. In this respect, we give our assent rather to the doctrine of *Emery's Case,* in Massachusetts, than to that of *People* v. *Kelly,* in New York; * * * Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party [emphasis added].

The "absolute immunity" language in the opinion was clearly unnecessary to the Court's decision. In *Emery's Case,* an immunity statute was found invalid because, like the statute before the Court in *Counselman,* it did not protect against derivative use of a witness' testimony. *People* v. *Kelly,* 24 N.Y. 74, on the other hand, which the Court also discussed in *Counselman,* had rejected the argument that to stand in place of the privilege, an immunity statute had also to protect against derivative use.[8] The correctness of the Court's decision in *Counselman* in holding the immunity statute before it invalid is not questioned, because "[i]t could not, and would not, prevent the use of [the defendant's] testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding (142 U.S. at 564). It is undeniable

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[8] See generally the *amicus* brief for the National District Attorneys Association in *Zicarelli* v. *New Jersey State Commission of Investigation,* No. 69–4, this Term, pp. 21–37.

that a witness incriminates himself whether his testimony is used directly against him or as the means of seeking out other evidence to prove his guilt—and this was the issue actually decided in *Counselman*. Accordingly, there was no need for the Court in *Counselman* to go further and announce a transactional immunity standard. See Mr. Justice White concurring in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 105–106.

This dictum, as one commentator has observed, "surely * * * was a wrong turning at a critical point." McCormick, *Evidence* 285 (1954). Most significantly, it was this dictum, and not the Court's holding, which led Congress to provide transactional immunity in its new immunity statute in the Interstate Commerce Act of 1893, 27 Stat. 443, which was the basic form taken by immunity statutes until the adoption of the 1970 Act.

The bill, which became the Compulsory Testimony Act, was introduced in Congress some sixteen days after this Court decided *Counselman*. In introducing the bill, Senator Cullom stated that the previous statute had been held invalid in *Counselman* because it was "not as broad in its scope as the Constitution, giving immunity or security to the rights of a witness under the Constitution." 23 Cong. Rec. 573. He later explained that the new bill "followed the line of the Supreme Court" in the *Counselman* case. 23 Cong. Rec. 6333. Congressman Wise, who introduced the bill in the House, also remarked that "the whole scope and effect of the act is simply to meet the decision rendered recently by the Supreme Court" in the *Counsel-*

man case. 24 Cong. Rec. 503. In short, Congress enacted the 1893 statute [9] which became the model for the later transactional immunity statutes in direct response to the *Counselman* language.

In *Brown* v. *Walker,* 161 U.S. 591, this statute was upheld. The Court repeated the language from *Counselman* that the earlier statute did not prevent the derivative use of the witness' testimony and that no statute which leaves the witness subject to prosecution can supplant the constitutional privilege. 161 U.S. at 594. The Court also said (161 U.S. at 595):

> If * * * the object of the [privilege against self-incrimination] be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then if no such prosecution be possible—in other words, if his testimony operate as a complete pardon for the offence to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question.

The Court was thus not presented with the issue whether a use-restriction statute which secured the witness against a criminal prosecution aided directly or indirectly by his disclosure could supplant the privilege.

The transactional statute presented in *Brown* was brought to this Court for reevaluation in *Ullmann* v. *United States,* 350 U.S. 422. In an opinion by Mr.

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[9] This new statute provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise * * *."

Justice Frankfurter, the Court upheld it. He pointed out that in *Brown* v. *Walker, supra,* this Court had ruled "that a statute which compelled testimony but secured the witness against criminal prosecution which might be aided directly or indirectly by his disclosures did not violate the Fifth Amendment's privilege against self-incrimination." 350 U.S. at 430. Significantly, in both *Brown* v. *Walker, supra,* and *Ullmann* v. *United States, supra,* the congressional scheme which adopted the "transactional" as opposed to the narrow "use" immunity statute made it unnecessary for this Court to determine whether a broad derivative use statute—like the one involved here—would be coextensive with the privilege.

Nor can Mr. Justice Frankfurter's statement in *Ullmann* that the 1893 statute had become "part of our constitutional fabric" (350 U.S. at 438) be read as freezing "transactional immunity" into the Constitution. If anything, the contrary is true; since shortly after that language he intimated that an immunity statute would be valid if it gave "complete amnesty" or prohibited "the use of the compelled testimony." In short, it was not until *Murphy* v. *Waterfront Commission,* 378 U.S. 52, that the Court considered immunity from use and derivative use.

In *Murphy,* the petitioners were subpoenaed to testify before a bistate (New York and New Jersey) commission investigating work stoppages at New Jersey piers. After refusing to respond to questions on the ground that the answers might tend to incriminate them, they were granted immunity from state

prosecution and continued to refuse to answer on the ground that they might incriminate themselves under federal law. Having that same day decided that the privilege against self-incrimination was applicable to the states, *Malloy* v. *Hogan,* 378 U.S. 1, the Court in *Murphy* squarely faced the issue whether, to be coextensive with the privilege, an immunity grant had to afford immunity from prosecution, or whether assurance that the testimony of a witness would not be used in any way was constitutionally sufficient.[10] This Court, in considering *Counselman,* quoted those portions of the opinion which noted that the statute there did not protect the witness from the use by the prosecution of the fruits of his testimony. 378 U.S. at 78–79. The Court in *Murphy* did not, however, mention the *Counselman* dictum that immunity from prosecution was a prerequisite of a valid immunity statute. Rather, *Murphy* held as a "constitutional rule" (*id.* at 79) that a state witness could be compelled to testify if "the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him" (*ibid.*). The Court recognized that the exclusionary rule it fashioned would leave "the witness and the Federal Government in substantially the same position as if the witness had claimed his

[10] The issue could not be avoided. If, to meet Fifth Amendment standards, the state had to assure immunity from prosecution, all state immunity statutes would be invalid since a state lacks the power to preclude other states or the federal government from prosecuting. However, if the Fifth Amendment forbids only use of compelled testimony, the statutes are valid. See *Murphy*, 378 U.S. at 93, 100 (concurring opinion of Justice White).

privilege in the absence of a state grant of immunity" (*ibid.*) thus satisfying the test of coextensiveness.[11]

Mr. Justice White (joined by Mr. Justice Stewart) in a concurring opinion pointed out (*id.* at 92–93):

> * * * the Court does not accept the far-reaching and in my view wholly unnecessary constitutional principle that the privilege requires not only complete protection against any use of compelled testimony in any manner in other jurisdictions but also absolute immunity in these jurisdictions from any prosecution pertaining to any of the testimony given. The rule which the Court does not adopt finds only illusory support in a dictum of the Court and, as I shall show, affords no more protection against compelled information than does the rule forbidding federal officials access to statements made in exchange for a grant of state immunity. * * *

In this showing, Mr. Justice White stressed that obtaining an inadmissible confession or illegally seized evidence did not bar prosecution *per se* and, indeed, unlike those situations, in the use immunity context the defendant did not have any initial burden to show that the government had acted illegally. He further noted that under an absolute immunity standard the defendant may have a greater burden of showing

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[11] As a procedural matter, the Court noted that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S. at 79, n. 18.

he had received immunity "where the relationship between the testimony and the prosecution is not obvious or where the immunity is acquired as a result of testimony before a grand jury or in an *in camera* administrative proceeding" (*id.* at 102–104). Finally, although recognizing that the continuing validity of the *Counselman* dictum was not involved in *Murphy*, Justice White expressed the view that not only was a use restriction constitutionally sufficient where separate sovereignties were involved but also that it was "possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation." 378 U.S. at 106.

This language of the concurring opinion confirms what is the plain import of the decision itself in *Murphy*. The Court there held that if immunity granted by a state is to be effective under the Fifth Amendment it must reach federal prosecutions, for "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U.S. at 77–78. In *Malloy v. Hogan, supra,* decided the same day, the Court held that the privilege against self-incrimination applies with the same force against the states as the federal government, because the Fourteenth Amendment does not apply a " 'watered-down, subjective version of the individual guarantees of the Bill of Rights * * *.' " 378 U.S. at 10–11. Thus the Court held that the Fifth Amendment privilege

against self-incrimination applies in full force against the states, that it protects against prosecution by governments other than the one granting immunity, and that when a state grants immunity, use and derivative use immunity are sufficient in terms of possible federal prosecution. It follows that such immunity must also be sufficient in respect to prosecution by the sovereignty granting immunity, be it federal or state.[12] If transactional immunity were required and the version of the Fifth Amendment applicable to the states were not "watered-down," then states could not grant immunity at all, since they lack power to give absolute immunity from federal prosecution; and *Murphy* would have been decided differently.

Since *Murphy,* this Court has not decided the precise issue involved here—whether use immunity is constitutionally sufficient where the jurisdiction which compelled the testimony is the same jurisdiction which later seeks prosecution. See *Piccirillo* v. *New York,* certiorari dismissed as improvidently granted, 400 U.S 548. See also *United States* v. *Freed,* 401 U.S. 601; *Stevens* v. *Marks,* 383 U.S. 234, 244, and concurring opinion of Harlan, J., at 249–250; *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79–80; *California* v. *Byers,* No. 75, Oct. Term, 1970, decided May 17, 1971 (Harlan, J., concurring opinion).

Nevertheless, since *Murphy,* statements of this Court have intimated the constitutionality of the use-restric-

[12] See the dissenting opinion of Judge Van Dusen in *United States ex rel. Catena* v. *Elias,* No. 18,855, C.A. 3, decided September 2, 1971 (slip op. at 14–16).

tion concept. In *Gardner* v. *Broderick,* 392 U.S. 273, 276, both *Counselman* and *Murphy* were cited for the proposition that:

> Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying.

See also *Spevack* v. *Klein,* 385 U.S. 511, 519–520 (concurring opinion); cf. *Uniformed Sanitation Men Assoc., Inc.* v. *Commissioner,* 426 F. 2d 619 (C.A. 2). Again, in *Marchetti* v. *United States,* 390 U.S. 39, 58, this Court viewed the government's suggestions that the registration and occupational tax provisions of federal law could meet Fifth Amendment standards if the Court imposed restrictions upon federal and state use of the information obtained as "in principle an attractive and apparently practical resolution" of the problem. However, because of a contrary congressional intent the standards were not imposed. See *United States* v. *Freed,* 401 U.S. 601 (sustaining a use-restriction scheme).

Moreover, it is of major significance that Congress in 1970 believed that the transactional immunity standard was no longer—if it had ever been—a constitutional requirement. As had Congress in 1893 in reacting to *Counselman,* so Congress in 1970 enacted the instant use immunity statute on the basis of its interpretation of this Court's more recent decisions—

principally *Murphy*.[13] We now turn to Congress' considered judgment in this matter, which carries great weight.

B. IT IS THE CONSIDERED JUDGMENT OF CONGRESS THAT THE USE-IMMUNITY RESTRICTION OF SECTION 6002 IS AS BROAD AS REQUIRED BY THE FIFTH AMENDMENT

1. The legislative history of 18 U.S.C. 6002 reveals that Congress considered that provisions for "use" and "derivative use" immunity were both desirable—primarily in the fight against organized crime—and, even more significantly, constitutionally permissible. It shows that, relying on *Murphy* v. *Waterfront Commission*, 378 U.S. 52, Congress gave its judgment that it was providing immunity as broad as required by the privilege against self-incrimination.

The statute was enacted as part of the Organized Crime Control Act of 1970.[14] As initially introduced, it

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[13] An analogous change has taken place in regard to taxation. In *Eisner* v. *Macomber*, 252 U.S. 189, the court held that no tax could constitutionally be imposed on a common stock dividend. It used sweeping language that a stock dividend was not income within the meaning of the Constitution. So Congress in the Revenue Act of 1921, c. 136, 42 Stat. 227, 228, enacted that "A stock dividend shall not be subject to tax * * *." Then in *Koshland v. Helvering*, 298 U.S. 441, in 1936, the Court intimated that some stock dividends—as common on preferred, or preferred on common, where there was a change of proportional interest—might be taxable. So Congress has now changed the 1921 sweeping statute and has enacted that certain stock dividends are taxable. Section 305 of the Internal Revenue Code of 1954, 26 U.S.C. 305.

[14] Congress, in a statement of findings and purpose as to the Organized Crime Control Act as a whole, stated: "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions,

was applicable only to grand jury and court proceedings. Shortly thereafter, in March 1969, the National Commission on Reform of Federal Criminal Laws, in an interim report, referred to the President and to Congress a proposed federal immunity statute, applicable to legislative and administrative proceedings as well. This provision was intended to replace existing, widely divergent, immunity statutes. The proposal recommended use and derivative use immunity rather than transactional immunity. The Commission concluded (Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 30, 91st Cong., 1st Sess., p. 288):

> We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege.

The following month, the President, in a message on organized crime, recommended this proposal to the Congress, stating (H. Doc. No. 91–105, 91st Cong., 1st Sess., p. 5):

> [W]e need a broad general immunity law to cover all cases involving the violation of a Federal statute. I commend to the Congress for its consideration the recommendations of the National Commission on Reform of Federal Criminal Laws. Under the Commission's proposal, a witness could not be prosecuted on the basis of anything he said while testifying, but

---

and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 922, 923.

> he would not be immune from prosecution based on other evidence of this offense. Furthermore, once the government has granted the witness such immunity, a refusal then to testify would bring a prison sentence for contempt. With this new law, government should be better able to gather evidence to strike at the leadership of organized crime and not just rank and file. * * *

Following hearings, the Senate and House Committees reported in part as follows:

> * * * This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. * * * It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964) rather than the transaction immunity concept of *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892). The witness is also protected against the use of evidence derivatively obtained. The statutory language is phrased in the terms of present law. See *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963). * * *

S. Rep. No. 91–617, 91st Cong., 1st Sess., p. 145; H. Rep. No. 91–1549, 91st Cong., 2d Sess., p. 42. See also S. Rep. No. 91–617, pp. 51–56, 107–108 (comments of the Department of Justice). These reports show that Congress was fully aware of the pronouncements of this Court and that the congressional choice was deliberate. Congress intended to give only the immunity it believed to be required by the Constitution and desired to protect the witness with a rule akin to the exclusionary rule.

A like intent was manifested at the hearings. Congressman Poff of Virginia, who introduced the bill

in the House, and who served as Vice-Chairman of the Commission on Reform of the Federal Criminal laws, explained that under the proposed bill (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11157 and H.R. 12041, 91st Cong., 1st Sess., p. 30):

> * * * the immunity grant would constitute a ground for the suppression of the use of compelled testimony and the fruits of that testimony, rather than a total defense. It would be a use restriction, a use restriction similar to the exclusionary rule which is now applied against such things as involuntary confessions, evidence acquired from unlawful searches and seizures, evidence acquired in violation of the Miranda warnings, to cite only a few examples. The witness could be prosecuted for his crime under this bill, provided the evidence used against him is independent of and untainted by the compelled testimony or its fruits.

The attention of the Senate Committee was directed to a report of Professor Robert G. Dixon, National Law Center of George Washington University and consultant to the National Commission on Reform of Federal Criminal Laws. He stated in part (Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 30, 91st Cong., 1st Sess. p. 310.):[15]

> Absolute immunity, acting like a *pardon for* all offenses related to the testimony, not only exonerates the witness for his offense under the

[15] This report is also set forth in Dixon, *Comment on Immunity Provisions*, National Commission on Reform of Federal Criminal Laws, Working Papers, Vol. II, pp. 1405–1444.

> statutes being administered by the agency conferring immunity, but also exonerates him for his offenses under other federal or state statutes in all instances where the offense relates to the area concerning which he testified. Under absolute immunity a mistake in granting immunity is very costly to society.
>
> A use-restriction rule, by contrast, only limits the interrogating agency * * * (and other agencies) in regard to use of the testimony and leads derived therefrom. * * *

The use immunity provision reflects neither a congressional dissatisfaction with the privilege nor a denigration of Fifth Amendment rights. Rather, it reflects a congressional judgment that complete transactional immunity exceeds the requirements of the Fifth Amendment. The present use immunity is based on a policy decision that the immunity granted be "as broad as, but no broader than, the privilege against self-incrimination" (S. Rep. 91–617, *supra*, p. 145).[16] Congress recognized that by preventing "immunity baths" society could avoid an intolerable result that could be brought about under a transactional statute by inter-agency mistakes or corruption.

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[16] Professor Dixon further stated (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11157 and H.R. 12041, 91st Cong., 1st Sess., p. 58):

> The proposed revision does not undercut the Fifth Amendment. It implements it, and in the process corrects a statutory error more than 75 years old. No honest citizen need fear it; no dishonest citizen need fear it; no criminal need fear it. The only persons aggrieved by the proposed change would be those seeking an extraordinary gratuity for crime.

Finally, the legislative history shows that Congress had the benefit of an experienced judgment on whether a factual hearing would be feasible and constitutionally adequate. Judge Edwards of the United States Court of Appeals for the Sixth Circuit and a member of the National Commission on Reform of Federal Criminal Laws expressed the view that the hearings on taint would "not [be] an impossible burden for the courts to carry" since the courts had already faced that problem in other contexts and "have built up a backlog of experience." (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11157 and H.R. 12041, 91st Cong., 1st Sess., p. 53). Cf. *Alderman* v. *United States,* 394 U.S. 165.

C. JUDICIAL ADMINISTRATION OF SECTION 6002 CAN FAIRLY SAFEGUARD THE PRIVILEGE AGAINST SELF-INCRIMINATION

In the great majority of instances in which immunity has been granted under Section 6002, there will be no subsequent federal prosecution for matters testified to; in those cases in which such prosecution is appropriate the factual determination of the question whether evidence is tainted is manageable. It is similar to, and no more difficult than, determinations that must be made under a transactional immunity standard and in the administration of other constitutional guarantees.

The immunity provision involved in this case was not passed for the purpose of enabling law enforcement officials to compel self-incriminating information from witnesses and then prosecute them for routine

matters. As the Assistant Attorney General in charge of the Criminal Division of the Department of Justice advised the House Subcommittee conducting the hearings on the bill (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11157 and H.R. 12041, 91st Cong., 1st Sess. p. 47):

> As a practical matter, where the witness has elected to testify under this statute, and he has been used, it would be a most unusual circumstance for the Government that used him to turn around and prosecute him.[17] * * *

This policy is reflected in the guidelines that the Department of Justice has promulgated to assist the United States Attorneys. These guidelines state in part (Memo. No. 595, Supp. 1, September 2, 1971, p. 5):

> It should be clearly understood, however, that it is the policy of the Department under the new use immunity statute to avoid future

[17] Other statements also reflect that it was only in the unusual case that prosecution of an immunized witness was intended. As Judge Edwards, a member of the Commission on Reform of Federal Criminal Law, remarked in his testimony at the House Hearings (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, on H.R. 11157 and H.R. 12401, 91st Cong., 1st Sess., pp. 53–54):

> * * * in most instances a grant of immunity is going to be made to a witness who isn't going to be prosecuted at all. That is probably the most important aspect of the whole matter. The prosecution will have just as much of an interest in protecting the interests of the person who has served the purposes of law enforcement in that regard as can be. As a consequence, fears for the person who has willingly cooperated under the grant of immunity are, I think, probably more fanciful than real.

> prosecutions of witnesses for offenses disclosed by such witnesses in their responses to questions after a grant of use immunity; such a prosecution shall not be initiated unless the matter is first referred to the appropriate Division of the Department in a written communication recommending prosecution and explaining the unusual circumstances which are felt to justify prosecution, unless the Assistant Attorney General in charge of such Division expressly recommends in a written communication to the Attorney General that the prosecution be authorized, and unless the Attorney General personally signs an authorization permitting the undertaking of the prosecution.

A practical reason for refraining from subsequent prosecution of a person who provides information is that the government has a vital interest in assuring the continued and unimpeded flow of information concerning criminal activities, and this interest may be furthered if a witness believes he will not be prosecuted.

There are, however, some circumstances in which a witness would appropriately be prosecuted after being compelled to testify, and in which transactional immunity would clearly provide an overly broad "gratuity." If a witness testifies before a grand jury without asserting any claim of privilege and repeats his grand jury testimony at a subsequent criminal trial involving others only after he is compelled to testify under the statute, he still may be prosecuted upon the

basis of independent evidence of his guilt.[18] A defendant who has entered a guilty plea (or been convicted without testifying himself) and is awaiting sentence may clearly be compelled to testify without being given immunity for the offense to which he has pleaded guilty (or of which he has been convicted).[19] Apart from these situations, there may be other circumstances in which an immunized witness who directly discloses his criminality can and should be prosecuted.

The privilege, of course, is applicable not only where criminality is directly disclosed, see *Mason* v. *United States,* 244 U.S. 362, but in every situation where the answer to a particular question might provide a "link in the chain of evidence needed to prosecute" the witness. *Hoffman* v. *United States,* 341 U.S. 479, 486. The government, however, may have overwhelming evidence to prove the "link" before the witness testifies. It may be interested only in other information possessed by the witness, and yet its questions may lead to testimony showing the "link." In such circumstances, the government should be able to prosecute the witness if it later learns from other independent evidence that the witness committed a crime, especially a crime more serious than the one concerning

[18] Compare *In re Neff*, 206 F. 2d 149 (C.A. 3), with *Ellis* v. *United States*, 416 F. 2d 791 (C.A.D.C.), setting forth contrary views as to whether a waiver of the Fifth Amendment privilege before the grand jury carries over to the trial.

[19] After sentencing, the conviction would remove the basis for a Fifth Amendment claim as to the crime for which the witness has been convicted. See *Reina* v. *United States*, 364 U.S. 507, 512–513.

which he was called to testify. In the latter circumstance, the criminality is separate from the reason for the compulsion and there is no "inquisition" connected to the offense which is the subject matter of the subsequent indictment.

Another reason for allowing the government the right to prove its case is untainted is that the government may need only the testimony of a particular witness in a limited area in which it would be willing to give "absolute immunity" as to any matter to which the witness testifies. But, when the witness is called at a trial, the determination of the extent of his cross-examination will rest in large measure with the defense and may embrace areas not covered by the prosecution. If transactional immunity is necessary, the witness may be given immunity on the basis of cross-examination either as to matters unanticipated by the prosecution or as to matters with respect to which the prosecution may possess overwhelming evidence. The single sovereign, therefore, may not have an unfettered "choice of exchanging immunity for the needed testimony." *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 98 (concurring opinion of Mr. Justice White). As we have already stressed, the very purpose of a "use" rather than a "transactional" statute is to permit some legitimate governmental leeway in the investigation of crime while at the same time affording the witness the full safeguards to which the privilege entitles him.

Contrary to the suggestion in Mr. Justice Brennan's dissent in *Piccirillo* v. *New York,* 400 U.S. 548, 567–569, the possible "uncertainties" of the fact-finding process are not a reason for rejecting use immu-

nity as constitutionally insufficient. It should be emphasized that in determining whether an immunized witness can be prosecuted, the burden of proof will rest upon the prosecution. This burden will be a heavy one. In any case where significant information is first divulged in the witness' testimony, it will be difficult as a practical matter for the government to show that its case does not arise from some use of the compelled testimony. Since there is a constitutional right involved, the government will meet its burden in every case only if it shows convincingly that its evidence is not tainted. Cf. *Chapman* v. *California,* 386 U.S. 18.

When the witness is compelled to testify by force of the statute, he generally will have counsel available who can familiarize himself with the implications of the questions in the settings in which they are being asked. See *Hoffman* v. *United States,* 341 U.S. 479. The assistance of counsel at this time can substantially assure that the witness will be protected from any improper future prosecution. Cf. *United States* v. *Wade,* 388 U.S. 218.

Moreover, the mere possibility of error in the fact-finding process has never been accepted by this Court as a sufficient basis to require total immunity from prosecution. "The privilege protects against real dangers, not remote and speculative possibilities," *Murphy, supra,* 378 U.S. at 102 (concurring opinion of Mr. Justice White). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimina-

tion." *Marchetti* v. *United States,* 390 U.S. 39, 53. Violations of the Fourth Amendment have been rectified by an exclusionary rule resting on a similar fact-finding process, *e.g., Mapp* v. *Ohio,* 367 U.S. 643, not by a ban on prosecutions; and the coerced confession cases illustrate that the Fifth Amendment does not require an absolute immunity in every case where a person is compelled to give evidence which may incriminate him. In those cases and in other cases where incriminating evidence has been obtained in violation of the Fifth Amendment, this Court has rejected the view that a person thereby becomes immune from prosecution. See, *e.g., United States* v. *Blue,* 384 U.S. 251, 255; *Miranda* v. *Arizona,* 384 U.S. 436. The remedy that accrues to the accused, like the remedy applicable to Fourth Amendment violations, is that the confession as well as any leads derived therefrom are excluded from evidence. The government is precluded from using the confession as substantive evidence against an accused in any way—directly or indirectly. It would be anomolous, we submit, to give a more stringent remedy in the case where the witness is represented by counsel and the immunized testimony has been recorded in a court, administrative or legislative proceeding.[20] See Mr. Justice White concurring in *Murphy, supra,* 378 U.S. at 103.

Finally, a rule of transactional immunity is not a cure for the complexities of fact-finding that typify

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[20] Significantly, the "same transaction" test has never been adopted under the double jeopardy clause of the Fifth Amendment. Cf. *Ashe* v. *Swenson,* 397 U.S. 436.

the protection of constitutional rights. Administration of that rule also requires ascertainment of whether evidence is "tainted" when a prosecution arises out of matters not testified to but with respect to which compelled testimony may have provided leads.[21] If it be assumed that courts can manage this inquiry, as well as the complex inquiry what precisely constitutes testimony concerning a matter for which a witness is subsequently prosecuted, see *Piccirillo* v. *New York,* 400 U.S. 548, 555, 573–574 (dissenting opinion of Brennan, J.), there is no reason to suppose they cannot administer a use and derivative use immunity statute in a manner that accords fairness to the Fifth Amendment rights of defendants.

II

THE FIFTH AMENDMENT DOES NOT PROHIBIT THE ADOPTION OF AN IMMUNITY STATUTE

In *Ullmann* v. *United States,* 350 U.S. 422, this Court held that the Fifth Amendment does not prohibit compulsory or otherwise self-incriminating testimony under an immunity statute of proper scope. In so ruling, it reviewed various objections to such a statute, and adhered to its earlier decision in *Brown* v. *Walker,* 161 U.S. 591, rejecting an argument that that decision should be overruled. Subsequently, in *Murphy*

[21] For example, if in an investigation of interstate car thefts a witness admitted participating in the theft of a particular automobile, and on the date on which he admitted having the car, the car had been seen near the location of a bank robbery, the government in a prosecution of the former witness for bank robbery would have to establish that its evidence was obtained independently of the testimony.

v. *Waterfront Commission,* 378 U.S. 52, this Court again recognized that such statutes may be constitutionally valid. Petitioners, who did not ask for reexamination of either *Brown* or *Ullman* in their petition for a writ of certiorari, now ask this Court to overrule these decisions (see Petitioners Brief, pp. 13–22). We submit that there is no sound reason to depart from the now settled rule that the Fifth Amendment does not prohibit a valid immunity statute. See *Piccirillo* v. *New York,* 400 U.S. 548, 562–563 (dissenting opinion of Mr. Justice Brennan).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-117

CHARLES JOSEPH KASTIGAR and
MICHAEL GOREAN STEWART,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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Interest of *Amici**

The American Civil Liberties Union is a nation-wide, non-partisan organization engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been particularly concerned with those societal values embodied in the Fifth Amendment's privilege against self-incrimination.

* Letters of consent to the filing of this brief from the attorneys for the respective parties have been filed with the Clerk.

The Fifth Amendment Privilege plays a central role in our accusatorial system of justice. It safeguards the individual against overbearing inquiries by the State. Yet, as reflected in these cases, it is once again under attack by legislatures and the courts.

The purpose of this brief is to identify the policies underlying the Privilege and to demonstrate that the requirement of full transactional immunity is the minimally tolerable erosion of the fundamental right of silence protected by the privilege. Finally, the brief points out certain procedural deficiencies unique to the legislative arrangement embodied in the federal statute.

Introduction and Summary of Argument

The issue in this case is the constitutionality, under the Fifth Amendment, of the central provision of the Organized Crime Control Act of 1970. That statute, part of the new provisions governing Immunity of Witnesses, provides for what is commonly known as "use immunity." The statute, 18 U.S.C. Section 6002, states that a witness before a federal court or agency or legislative committee may not rely on the Fifth Amendment Privilege as a basis for refusing to answer questions or provide other information. In exchange for this withdrawal of the privilege, the statute offers the following:

> . . . but no testimony or other information compelled under the order (or any information directly or in-

> directly derived from such testimony or other information) may be used against the witness in any criminal case . . .

We submit that this limited immunity is grossly inadequate to supplant the privilege against self-incrimination, even assuming *arguendo* that any grant of immunity would be adequate.

In our amicus curiae brief filed in the companion cases of *Zicarelli* v. *New Jersey State Commission of Investigation,* No. 69-4, and *Sarno* v. *Illinois Crime Investigating Commission,* No. 70-7, which raise the issue of the constitutionality of similar provisions, we argued that a grant of complete transactional immunity was the minimally acceptable substitute for the privilege. We also argued that the decision and reasoning in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964) did not require a different conclusion. In Points I and II, *infra,* we will briefly summarize these two arguments. But for their full development, we respectfully refer the Court to our brief filed in *Zicarelli* and *Sarno.*

However, we think that there are certain factors unique to the federal immunity statute at issue here, which suggest additional reasons for invalidating the federal statutory arrangement. In Point III, *infra,* we briefly discuss those issues.

I.

Full Transactional Immunity Is the Minimally Acceptable Substitute for the Fifth Amendment Privilege to Remain Silent.

The premise against which any immunity statutes must be judged is that the Fifth Amendment has consistently been thought to afford individuals the cherished right to remain silent. Accordingly, *any* device, be it immunity statute or truncheon, which operates to breach that silence and compel a man to confess criminal conduct runs afoul of the purpose of the constitutional privilege and impairs the societal policies which that privilege seeks to further.

As this Court has recognized on numerous occasions, the privilege was written against the background of the abuses perpetrated by England's Star Chamber and High Commission through use of the oath *ex officio*. Those inquiries were usually directed at the "crimes" of political or theological dissent. See *Miranda* v. *Arizona,* 384 U.S. 436, 458-60 (1966). In effect the privilege was intended to prevent the state from rummaging through the closets of the mind in search of the secrets contained therein.

In this respect the values safeguarded by the Fifth Amendment privilege dovetail with those protected by the Fourth Amendment and together provide a right of privacy against governmental intrusion. The ultimate relationship between these two constitutional safeguards was enunciated almost a century ago in *Boyd* v. *United States,* 116 U.S. 616 (1886), where the court noted that "the Fourth and Fifth Amendments run almost into each other." *Id.* at 630. As former Chief Justice Warren put it,

> . . . the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *U. S.* v. *Grunewald,* 233 F.2d 556, 579, 581-82 (Frank, J., dissenting), rev'd, 353 U.S. 391 (1957). *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964).

These principles help illuminate the way in which this Court has considered the more particular issues of the validity of immunity statutes. Since this Court's initial consideration of these issues in *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892), two theories competed for acceptance. One theory holds that *no* immunity statute is constitutionally sufficient to displace the privilege and compel a man to speak. This view was enunciated in 1807 by Chief Justice Marshall, almost commanded a majority in *Brown* v. *Walker,* 161 U.S. 591 (1896), and was articulated by Justice Douglas, joined by Justice Black in *Ullmann* v. *United States,* 350 U.S. 422 (1956).

This absolute position (with which we fully concur) has not prevailed. Instead, this Court has adopted the rule that a grant of immunity from prosecution is the minimally acceptable substitute for the privilege. However, the doctrinal tension has always been between the minority view, that the privilege and its underlying policies affords the complete right to silence, and the prevailing view that statutes which grant transactional immunity are sufficient. Thus, the debate has always been between silence and transactional immunity, not between transactional immunity and something less. The transactional immunity rule has prevailed not over the argument that it afforded

too much protection, but over the objection that it gave too little. See *Catena* v. *Elias,* —— F.2d ——, 40 Law Week 2123 (3rd Cir. 9/2/71, *en banc*).

Thus in *Counselman* v. *Hitchcock, supra* the Court considered the validity of the first federal use immunity statute and held it unconstitutional because it failed to afford "absolute immunity against future prosecution for the offense to which the question relates . . ." *Id.* at 586. In ruling that full transactional immunity was the minimally acceptable erosion of the privilege against self-incrimination, the Court effected an intended compromise between the position of Chief Justice Marshall—that the privilege was tantamount to a right to remain silent—and the exclusionary-type rule embodied in such decisions as *People* v. *Kelly,* 24 N.Y. 74 (1861).

In response to the constitutional requirements enunciated in *Counselman,* Congress enacted a transactional immunity statute. See 27 Stat. at L. 443 (1893). In *Brown* v. *Walker,* 161 U.S. 591 (1896), a challenge to the validity of that statute reached this Court. By a narrow 5-4 vote, the Court upheld the constitutionality of the transactional immunity provision, holding that "if no such prosecution be possible —in other words, if his testimony operate as a complete pardon for the offense to which it relates—a statute absolutely securing him such immunity from prosecution would satisfy the demands of the clause in question." 161 U.S. at 595. Four Justices dissented, reasoning that transactional immunity was insufficient to displace the privilege. Justice Shiras' opinion found such statutes deficient in a variety of practical respects. Justice Field concluded that the Fifth Amendment guaranteed "a shield of absolute silence" protecting the individual not only against criminal

prosecution, but against "infamy and disgrace" as well. 161 U.S. at 630-31.

Throughout the sixty years following *Brown* v. *Walker*, this Court consistently reaffirmed the transactional immunity rule. See *Hale* v. *Henkel*, 201 U.S. 43 (1906); *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924); *United States* v. *Monia*, 317 U.S. 424 (1943); *Adams* v. *Maryland*, 347 U.S. 179 (1954).

Finally, in *Ullmann* v. *United States*, 350 U.S. 422 (1956) the issues raised in *Counselman* were once again explored. Justice Frankfurter, writing for the majority of the Court, upheld the constitutionality of the transactional immunity provision which had become "part of our constitutional fabric." Justices Douglas and Black dissented, advocating adoption of the view of the *Brown* dissenters "that the right of silence created by the Fifth Amendment is beyond the reach of Congress." 350 U.S. at 440.

In sum, from *Counselman* through *Ullmann* there was no authority whatever for the proposition that something less than full transactional immunity could adequately supplant the Fifth Amendment privilege. Transactional immunity has consistently been regarded as the minimal protection that could be afforded to a witness. To the extent that there was any dissent from the *Counselman* rule, such opposition has traditionally argued that transactional immunity did not provide enough protection.

II.

Where Only One Jurisdiction Is Involved, *Murphy* v. *Waterfront Commission* Is No Bar to the Requirement of Full Transactional Immunity.

The recent suggestion that the Fifth Amendment only requires the inquiring sovereign to grant use immunity in order to abrogate the witness' privilege, as embodied in this federal statute, is premised on certain language in *Murphy* v. *Waterfront Commission, supra.* See *Uniformed Sanitation Men's Association Inc.* v. *Commissioner of Sanitation,* 426 F.2d 619 (2d Cir. 1970). This was the basis for the decision below. But *Murphy,* properly read, is consistent with the doctrine that as between the witness and an inquiring sovereign, particularly where the latter is a federal agency, nothing less than full transactional immunity will satisfy the Fifth Amendment.

In *Murphy,* the witness, already granted transactional immunity by the state, argued that he nevertheless had no protection against the federal government. The Court agreed, holding that the witness could not be made to incriminate himself unless that information could not be used by federal officials. 378 U.S. at 79. The decision was a recognition of important needs of federalism. Since a state lacked the power to grant immunity from prosecution by other states or the federal government, to have required it to do so would have meant that no state could inquire into incriminating areas at all. Moreover, *Murphy* was an extension of the privilege because it overruled decisions which had held that *no* immunity was required as against the non-inquiring sovereign. It is ironic now to suggest that because *Murphy* did not go so far as to require that

transactional immunity be granted by all sovereigns, then transactional immunity need not be conferred by any sovereign, even the one that compels the witness to yield his right to remain silent.

Moreover, when the federal government makes the incriminating inquiry, not only must it afford transactional immunity itself, but it can offer a grant of immunity binding on all state or local agencies. When the federal government inquires in exchange for a grant of transactional immunity, none of the dilemmas posed by the *Murphy* inter-jurisdictional situation are presented. Ever since *Brown* v. *Walker, supra,* this Court has held that by virtue of the Supremacy Clause a federal grant of transactional immunity is binding upon all state prosecutorial agencies,

> It is argued in this connection that, while the witness is granted immunity from prosecution by the Federal government, he does not obtain such immunity against prosecution in the state courts. We are unable to appreciate the force of this suggestion. It is true that the Constitution does not operate upon a witness testifying in the state courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several states, except so far as the 14th Amendment may have made them applicable [citations omitted].
>
> There is no such restriction, however, upon the applicability of Federal statutes. The 6th article of the Constitution declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall

> be made under the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding". 161 U.S. at 607. See also, *Adams* v. *Maryland, supra; Reina* v. *United States,* 364 U.S. 507 (1960).

That *Murphy's* exclusionary rule aspect is limited to the type of situation involved there has been recognized by subsequent decisions of this Court reaffirming the continued vitality of *Counselman.* See, e.g., *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 80 (1965); *Stevens* v. *Marks,* 383 U.S. 234, 244-45, 249-50 (1965).

Moreover, the court below stands alone in holding that *Murphy* did impair *Counselman* and authorizes the kind of limited immunity embodied in this statute. Decisions by federal courts in the Second Circuit, see *In the Matter of the Grand Jury Testimony of Joanne Kinoy,* 326 F. Supp. 407 (S.D.N.Y. 1971), the Seventh Circuit, see *In re Korman,* —— F.2d ——, 39 Law Week 2681 (5-20-71), and just recently the Third Circuit, see *Catena* v. *Elias,* —— F.2d ——, 40 Law Week 2123 (*en banc,* 9-2-71) have invalidated use immunity statutes. As the Seventh Circuit succinctly put it,

> We hold that *Counselman* remains the binding, authoritative exposition of the minimal constitutional requirements for immunity statutes. Those minimal constitutional requirements prohibit the Federal Government, absent a grant of absolute immunity from prosecution for any transaction to which his compelled testimony relates, from committing for contempt a witness who relies on his fifth amendment privilege and refuses to testify. —— F.2d at ——, 39 Law Week at 2681.

Nothing in *Murphy* v. *Waterfront Commission* requires a contrary conclusion.

III.

The Statutory Arrangements Surrounding the Immunity Provision Foster Severe Uncertainty for the Witness and Authorize Substantial Violations of the Fourth Amendment.

For the reasons outlined in points I and II, *supra,* the immunity provision of section 6002 is patently inconsistent with the requirements of the Fifth Amendment as enunciated in the decisions of this Court. That, of course, is the precise issue in this case, and this Court's precedents provide ample grounds for a holding of unconstitutionality. But beyond that, the legislative arrangement is deficient in two other respects which reflect upon the validity of the immunity provision itself. First, Congress, hedging its bets, has retained transactional immunity provisions in a variety of hard-core federal criminal areas. The result is a legislative patchwork that can only confront the witness with extreme uncertainties. Second, the statute provides a method for obtaining compulsive orders which violates the interests protected by the Fourth, as well as the Fifth Amendments.

A. *The optional immunity procedures allowed by the statute create the kind of "intricate scheme" of immunity forbidden by the Fifth Amendment.*

In many respects the Immunity of Witnesses statute is a departure from the federal statutory arrangements which existed prior to 1970. But perhaps the central feature of the statute is its ambivalence. It is clear, of course, that

the immunity provision involved in this case was obviously intended to confer only use immunity instead of the protection of transactional immunity which had traditionally been afforded under federal immunity statutes since 1893. But due perhaps to uncertainty as to whether a grant only of "use" immunity would be constitutionally permissible, Section 227 of the Organized Crime Control Act delayed the repeal of the 18 U.S.C. Section 2514 "transactional" immunity standard until 1974.[1]

As a result of the saving provision, 18 U.S.C. 2514 continues to provide for "transactional" immunity "before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in Section 2516 . . . " And the offenses enumerated in Section 2516 are the following:

> (a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);
>
> (b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

---

[1] Section 227(a) of P.L. 91-452 reads as follows: "Section 2514 of Title 18, United States Code, is repealed effective four years after the effective date of this Act."

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations);

(d) any offense involving counterfeiting punishable under sections 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

We suspect that this duality in the legislative arrangement was due to Congressional uncertainty as to the constitutionality of use immunity. But whatever the cause, the effect on the witness is one of severe uncertainty. In numerous situations transactional immunity might still be available. But the witness can never be certain in the particular situation whether use or transactional immunity will be afforded, because the availability of transactional immunity is completely within the unfettered discretion of the prosecuting attorney. As District Judge Hanson has said in a recent interpretation of 18 U.S.C. 6002, "the language [of 6002] is not mandatory; the presiding officer may choose to seek an order under the provisions of another enactment such as 18 U.S.C., Section 2514." *In re Brown,* —— F. Supp. ——, 40 Law Week 2084, 2085 (S.D. Iowa, 7/12/71). Thus the witness will in many situations be entering the grand jury room without knowing whether transactional or use immunity will be conferred and without the benefit of counsel to clarify the uncertainties. Therefore, quite apart from the question of the scope of immunity necessary to satisfy the Fifth Amendment, it remains apparent that Section 227 of P.L. 91-452 creates a situation of statutory ambiguity and uncertainty which in itself is constitutionally impermissible.

The optional immunity procedure created by Section 227 is the kind of "intricate scheme" condemned by this court in *Stevens* v. *Marks, supra* when it declared:

> The State may not substitute for the privilege against self-incrimination an intricate scheme for con-

ferring immunity and thereafter hold in contempt those who fail fully to perceive its subtleties. 383 U.S. at 246.

The complexities of the present statutory scheme are constitutionally defective insofar as they subject witnesses to the uncertainties of not knowing whether they will be protected by use or transactional immunity, particularly since they face hostile questioning behind the closed doors of the grand jury room unrepresented by counsel. Moreover, practical experience as revealed by such cases as *Raley* v. *Ohio*, 360 U.S. 423 (1959)[2] and *Stevens* v. *Marks*, *supra*,[3] points to the existence of overzealous prosecutors and indicates the necessity for unambiguous standards and proscriptions to witnesses from the vagaries of prosecutorial zeal and discretion and the resulting coercion created by uncertainty.

B. *The method for obtaining compulsive orders under Section 6003 violates the Fourth Amendment prohibition against unreasonable searches and seizures.*

The majority opinion in *Ullmann* v. *United States, supra,* clearly affirmed the proposition that transactional immunity presents the maximum tolerable erosion of the Fifth Amendment. Nevertheless, *Ullmann* did not settle "fundamental questions of procedure .... [relating] to the manner in which the government's application for an order compelling testimony before the grand jury should be handled." See *In re Bart,* 304 F.2d 631, 634 (D.C.C.A., 1962). These

[2] *Raley* involved a situation where the existence of immunity was never suggested to the witness.

[3] *Stevens* v. *Marks* involved a public officer who was held in contempt of court for refusing to testify after he withdrew a waiver of the privilege.

fundamental procedural problems are elevated to questions of constitutional magnitude by the recently enacted immunity statute. See *Boyd* v. *United States, supra.*

Section 6003 of the statute requires that the United States District Court shall issue an order compelling an individual to give testimony or to provide other information when in the opinion of the United States Attorney "(1) the testimony or other information . . . may be necessary to the public interest, and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination," and when approval for the order has been obtained by the Attorney General or a designated subordinate. The sole test of whether the order shall be issued is whether, in the judgment of the United States Attorney, the testimony is "necessary to the public interest." Thus an individual can be ordered to produce his most personal papers if in the opinion of the United States Attorney their revelation would be "necessary to the public interest." The statute, on its face, does not even require a factual showing that the compelled testimony or documents are necessary to the public interest.

To require the compulsory production of testimonial or documentary evidence merely upon the unfettered judgment of the United States Attorney clearly violates the Fourth Amendment prohibition against unreasonable searches and seizures. The court must exert some supervisory control to assure that Fourth Amendment rights are not violated. The government should not be permitted to obtain by court order under Section 6003 what it could not accomplish without a search warrant based upon probable cause.

At the very least, the United States Attorney should be required to *demonstrate* that the production of the desired evidence is necessary to the public interest. And even then the statutory standard herein, "necessary to the public interest," is totally inconsistent with the test of "reasonableness" required by the Fourth Amendment. The "public interest" test imposes no restrictions upon the scope of the inquiry and the extensiveness of the compulsion. Yet it is well recognized that the Fourth Amendment prohibits subpoenas which sweep too broadly. See *F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298 (1924); *Hale* v. *Henkel, supra; McMann* v. *S.E.C.*, 87 F.2d 377 (2d Cir., 1937), *cert. den. sub nom. McMann* v. *Engel*, 301 U.S. 684 (1937); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946).

In his opinion in *Matter of Grand Jury Subpoena Duces Tecum Addressed To Provision Salesmen and Distributors Union, Local 627, AFL-CIO*, 203 F. Supp. 575, 578 (S.D.N.Y. 1961), Judge Herlands analyzed the standard of "reasonableness" imposed by the Fourth Amendment:

> The courts have found that reasonableness, in [the] context [of the Fourth Amendment] has three components. The subpoena duces tecum may command only the production of things relevant to the investigation being pursued. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-209, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *Brown* v. *United States*, 276 U.S. 134, 143, 48 S.Ct. 288, 72 L.Ed. 500 (1928); *F.T.C.* v. *American Tobacco Co.*, 264 U.S. 298, 306-307, 44 S.Ct. 336, 68 L.Ed. 696 (1923); *Hale* v. *Henkel*, 201 U.S. 43, 77, 26 S.Ct. 370, 50 L.Ed. 652 (1960). The subpoena must specify the things to be produced with reasonable

particularity. *Brown* v. *United States,* 276 U.S. 134, 143, 44 S.Ct. 336, 68 L.Ed. 696 (1928); *Hale* v. *Henkel,* 201 U.S. 43, 77, 26 S.Ct. 370, 50 L.Ed. 652 (1906). The subpoena may order the production of records covering only a reasonable period of time. *Brown* v. *United States,* 276 U.S. 134, 143, 44 S.Ct. 336, 68 L.Ed. 697 (1928); *Schwimmer* v. *United States,* 232 F.2d 855, 863 (8th Cir. 1956), cert. denied 352 U.S. 833, 77 S.Ct. 48, 1 L.Ed.2d 52 (1956); *United States* v. *Medical Society,* 26 F. Supp. 55, 57 (D.C.D.C. 1938); *In re Eastman Kodak,* 7 F.R.D. 760, 763 (W.D.N.Y. 1947).

But when measured against these three components of reasonableness, the statute at bar proves constitutionally defective. Section 6003 permits prospective orders to be issued against "any individual who . . . may be called to testify" and who "is likely to refuse to testify." But, because prospective orders are necessarily anticipatory and must be issued before the witness actually testifies the District Court is deprived of the opportunity to examine the relevancy of desired evidence within the context of actual testimony. The new statute permits the issuance of orders of compulsion by district courts "to possible witnesses in exchange for undescribed evidence of undisclosed value in unidentified investigations." See *In re McElrath,* 248 F.2d 612, 615 (D.C. Cir. 1957).

Prospective orders mandated by the instant statutes do not permit the contextual examination of evidence which is necessary to insure that the United States Attorney is not exceeding the limitations imposed by the Fourth Amendment.

These two deficiencies—the uncertainties created by the saving provision and the violations of Fourth Amendment

rights authorized by Section 6003—are analytically independent of the immunity provisions of Section 6002. But they reflect the legislative mood in which that central provision was enacted. We submit that these defects must be taken into account in the Court's consideration of the constitutionality of the central provision.

CONCLUSION

For the reasons set forth above, the decision below should be reversed and the immunity provision in 18 U.S.C. Section 6002 should be held violative of the requirements of the Fifth Amendment.

Respectfully submitted,

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IN THE

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

I.

The Policy of the Fifth Amendment Forbids Use-Immunity.

The Government seeks to justify use-immunity on the theory that "the public has the right to every man's evidence" (Gov't Br. pp. 7, 11, 13).

This is one of those pithy over-statements that excites the viscera, rather than reason.[1] There is a good deal of evidence that the public is not entitled to hear—

[1] *Cf. Garrity v. New Jersey*, 385 U.S. 493, at p. 499 (1967) where a majority of this Court rejected the Holmesian dictum that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220.

even though true—because forbidden by the Constitution, public policy, statute or judicial rule.[2]

Most particularly, the public has no right to self-incriminating evidence extorted from a witness, for the Fifth Amendment expressly states that: "No person . . . shall be compelled . . . to be a witness against himself . . .". It follows that a witness is under "no duty to disclose" information or "aid in the enforcement of the law" against himself (Gov't. Br. p. 13).

The Government's Brief concedes (pp. 13, 20) that immunity is not co-extensive with the Fifth Amendment Privilege where testimony compelled thereunder may aid Government directly or indirectly. (*Brown v. Walker*, 161 U.S. 591, 597 (1896)). This is because the right to remain silent, guaranteed by the Fifth Amendment, assures a witness that his testimony will not aid Government in securing a conviction against him. Transactional immunity serves substantially the same end, for as long as a witness is immunized from prosecution for any offense which is the subject of his testimony, he is receiving essentially the same protection afforded him by the Privilege.

Use-immunity, however, can offer no such protection. On the contrary, whenever a person is compelled to im-

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[2]See: *Mapp v. Ohio*, 367 U.S. 643 (1961) holding that the Fourth Amendment requires exclusion of illegally seized evidence; *Katz v. United States*, 389 U.S. 347, 359 (1967) Exclusion of illegal eavesdropping evidence held required by Fourth Amendment; *Rogers v. Richmond*, 365 U.S. 534, 543-544 (1961) requiring suppression of a coerced confession irrespective of its probable truth or falsity; *Blau v. United States*, 340 U.S. 332 (1951), communication between husband and wife deemed privileged; *Cafritz v. Koslow*, 167 F.2d 749, 751 (C.A.D.C., 1948) ". . . the [client-attorney] privilege is an *exception* to the general liability of every person to give testimony upon all facts inquired of in a court of justice." (Emphasis supplied).

plicate himself in a crime for which he remains prosecutable, he is furnishing evidence which can aid Government in obtaining his conviction, whether or not such evidence, or its fruits, are actually used at trial. For example, the prosecution can cross-examine a witness at trial based on information gained from him in the Grand Jury room. Critical information obtained from a use-immunized witness may furnish leads to witnesses or to evidence whose source is impossible to prove, or though proven, is deemed admissible on the theory that it would have been obtained eventually by independent means (See: *People v. Ditson*, 57 Cal.2d 415, 20 Cal.Rptr. 165 (1962) (cert. denied); *cf.: Wayne v. United States*, 318 F.2d 205, 209 (C.A. 4th, 1963)). Or, tainted evidence may be imparted by investigators to a key witness in such a way as to emerge at trial as independently acquired.

The policy of the Privilege is not limited to exclusion of tainted evidence from trial, but bars *any* use of it which foreseeably would benefit the prosecution, though beyond the reach of a motion to suppress (See: *Brown v. Walker*, 161 U.S. 591, at pp. 595, 597 (1896)).[2a]

As the Government's Brief concedes (p. 14), the witness must be placed "in the same position with respect to a criminal prosecution after his testimony, as he was before". It is evident that under the use-immunity statute at bar, he cannot be. Therefore, the statute offends the Fifth Amendment because its protection is inadequate.

[2a]". . . If an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the question is put to him may assume an inquisitorial

(This footnote is continued on next page)

II.

Counselman's Injunction Against Use-Immunity Is Not Dictum; and in Fact Has Become a Part of Our Constitutional Fabric.

In *Counselman v. Hitchcock*, 142 U.S. at p. 585-586, this Court unanimously held that—

> "No statute which leaves the party or witness subject to prosecution after he answers the incriminating question put to him can have the effect of supplanting the Privilege conferred by the Constitution of the United States. [Use-] immunity does not supply a complete protection from *all* the perils against which the Constitutional prohibition was designed to guard, and is not a full substitute for that provision. In view of the Constitutional provision, a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which it relates." (Emphasis supplied).

The Government argues that this language is mere dictum which furnishes only "illusory support" for the rule it announces, and need not be followed by this Court (Gov't. Br. p. 14).

As the Seventh Circuit observes in *Matter of Jack Korman, et al.*, 449 F.2d 32, at p. 37:

> "It is illogical, in light of the decision cited, to argue that the [Supreme] Court has never 'held' that transactional immunity is the minimal requirement and that the assertions to that effect are mere dicta."

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character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the early state trials . . . made the system so odious as to give rise to a demand for its total abolition."

The fact is that the central issue presented, argued and decided in *Counselman* was whether use-immunity as such satisfied the demands of the Fifth Amendment. The Government contended in *Counselman* (142 U.S. at p. 557), as it does here, that the Fifth Amendment guarantees only that a witness's testimony would not be used against him. In support of its position, the Government cited *People v. Kelly,* 24 N.Y. 74, and like cases, upholding State use-immunity statutes which, unlike that in *Counselman,* prohibited even derivative use. The Government sought to distinguish *Emery's Case,* 107 Mass. 172, and others which held use-immunity inadequate under State Constitutions which the Government contended contained different phraseology than the Fifth Amendment.

After a careful analysis of *People v. Kelly,* and the line of cases following that rationale, this Court *unanimously* rejected the view that the Fifth Amendment protected only against the use of compelled testimony, stating:

> "In view of the Constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which it relates. In this respect, we give our assent rather to the doctrine of *Emery's Case,* in Massachusetts, than to that of *People v. Kelly,* in New York; and we consider the ruling of this Court in *Boyd v. United States, supra,* supports the view we take." (142 U.S. at p. 586).

As Mr. Justice Frankfurter was later to summarize for a majority of the Court in *Ullman v. United States,* 350 U.S. 422, at pp. 436-437:

> "Four years previously, in *Counselman v. Hitchcock,* 142 U.S. 547, a unanimous court had

found constitutionally inadequate the predecessor to the 1893 statute because the immunity granted was incomplete in that it merely forbade the use of the testimony given and *failed to protect a witness from further prosecution based on knowledge and sources of information obtained from the compelled testimony*."

While only transactional immunity was presented in *Brown v. Walker,* 161 U.S. 591, the majority opinion in no way departed from the view expressed in *Counselman* that the Fifth Amendment required absolute immunity from prosecution. Indeed, the *Brown* majority, rejecting the contention of the four dissenting justices that no immunity could constitutionally displace the Privilege, chose to read that provision as satisfied by—

> "secur[ing] the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure." (161 U.S. at p. 595).

Thus, thought the *Brown* majority, if a statute permitted a witness's testimony to—

> ". . . operate as a complete pardon for the offense to which it relates—a statute absolutely securing to him *such* immunity *from prosecution* would satisfy the demands of the clause in question." (161 U.S. at p. 595) (Emphasis supplied).

The *Counselman* doctrine that nothing less than immunity from prosecution could effectively supplant the Fifth Amendment Privilege became thereafter and has remained a viable principle of constitutional law.[3] So

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[3]*Hale v. Henkel,* 201 U.S. 43, 67 (1906); *Heike v. United States,* 227 U.S. 131, 142 (1913); *McCarthy v. Arndstein,* 266

much so, that Mr. Justice Frankfurter was prompted to observe that the transactional immunity conferred by—

> "the 1893 statute has become part of our constitutional fabric . . ." (*Ullman v. United States, supra,* 350 U.S. at p. 438).

The Government Brief contends (p. 21) that Justice Frankfurter did not mean what he said because "shortly after that language he intimated that an immunity statute would be valid if it gave 'complete amnesty' or prohibited the use of 'compelled testimony' ". This assertion is palpably incorrect as the context reveals. Justice Frankfurter was simply noting the existence of such immunity statutes at a time when the Fifth Amendment had not yet been deemed applicable to the States.[4]

In no way did Justice Frankfurter express or imply that use-immunity was co-extensive with the Fifth. On the contrary, in his dissent in *United States v. Monia,* 317 U.S. at p. 438, he noted that—

> "For more than seventeen years thereafter it was unquestioned that Congress had given no more than the Constitution *required*—freedom from prosecution for evidence that could not otherwise be obtained . . .".

In any event, the Government's insistence that *Counselman's* prohibition against use-immunity is mere

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U.S. 34, 42 (1924); *United States v. Monia,* 317 U.S. 424, 428 (1943); *Reina v. United States,* 364 U.S. 507, 514 (1960) (holding that testimony compelled under a Federal transaction immunity statute safeguarded the witness from either Federal or State prosecution. See also: *Adams v. Maryland,* 347 U.S. 179, 182 (1954).

[4]See: *Feldman v. United States,* 322 U.S. 487 (1944).

dicta cannot stand exposure to *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, which the Government's Brief (p. 25) inexplicably brushes aside as inapposite.

In *Albertson*, the Court, noting the afore-quoted language of *Counselman* (142 U.S. at pp. 585-586), unanimously[5] found that when "*measured by these standards*", the use-immunity granted by the statute at bar was "not complete". (382 U.S. at p. 80) (emphasis added).[6]

The significance of *Albertson* is not only that it reaffirmed *Counselman* in the context of a use-immunity statute, but that it did so one year *after* this Court's decision in *Murphy v. Waterfront Commission, etc.*, 378 U.S. 52 (1964), which the Government—and Congress—assume reversed Counselman *sub silencio*.

That view is not justified in light of *Albertson*; nor, as we shall now see, is it warranted by *Murphy*, either.

III.

Neither Murphy vs. Waterfront Commission, nor Any Decision of This Court Since, Has Authorized or Approved Use-Immunity as Constitutionally Permissible.

The Government's analysis of decisions of this court lead it to conclude that *Murphy* and post-*Murphy* opinions have viewed the Fifth Amendment Privilege as barring only the use of incriminating testimony

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[5]Mr. Justice White did not participate; but Mr. Justice Stewart, who concurred with Mr. Justice White's Opinion in *Murphy*, did.

[6]See also: *Reina v. United States*, 364 U.S. 507, holding a transactional immunity statute barred prosecution in either a State or Federal court, based on testimony given thereunder.

(Gov't Br. pp. 24-26). Support for this contention leans heavily, if not exclusively, upon the concurring opinion of Mr. Justice White, whose learned views on the subject were carefully avoided by the majority,[7] and therefore cannot be read as an extension of the prevailing opinion of that court.

For one thing, the statute before the court in *Murphy* conferred *transactional*, not use, immunity. Therefore, it was unnecessary for the *Murphy* court to consider whether use-immunity was co-extensive with the Fifth Amendment Privilege, and it did not attempt to do so.

More importantly, the *Murphy* majority, far from undermining *Counselman*, expanded the scope of the Privilege by extending its reach to the States. This it did by overturning a doctrine which, since *Brown v. Walker*, 161 U.S. at p. 606, had been deposited on the misconception that English case law held that immunity granted by one jurisdiction was not binding upon another.[8] But the court, acutely sensitive to the delicacy of Federal-State relations, steered the new rule along a constitutional course which permitted each jurisdiction to utilize immunity as it deemed appro-

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[7]It must surely come as a surprise to Messrs. Justices Douglas and Brennan that the majority opinion in which they joined in *Murphy* is now to be construed as upholding use-immunity, in view of Mr. Justice Douglas' dissent with the late Justice Black, in *Ullman v. United States, supra,* 350 U.S. at pp. 507 *et seq.*, and with the dissent of both Justices in *Piccirillo v. New York,* 400 U.S. at pp. 549, 552; and in further light of *Albertson, supra,* which was written, of course, by Mr. Justice Brennan and joined in by Mr. Justice Douglas.

[8]*Jack v. Kansas,* 199 U.S. 372 (1905); *United States v. Murdock,* 284 U.S. 141, 149 (1961). *Cf. Feldman v. United States, supra,* 322 U.S. 487 and *Knapp v. Schweitzer,* 357 U.S. 371 (1958), which reached the same conclusion via a different theory.

priate to the enforcement of its laws, while avoiding a rationale which would allow so-called "immunity baths" to be conferred by the first jurisdiction to grant a witness immunity. For the latter alternative would surely have been the consequence of a ruling which permitted transactional immunity conferred by one jurisdiction to bar prosecution for the subject offense in the other.

It was with these pragmatic considerations in mind that Mr. Justice Goldberg, writing for the majority, held—

> ". . . the constitutional rule to be that a State witness may not be compelled to give testimony which may be incriminating under Federal law unless the compelled testimony and its fruits cannot be used in any manner by Federal officials in connection with a criminal prosecution against him." (378 U.S. at p. 79).

If the majority had believed that use-immunity, as such, could constitutionally "accommodate the interests of the State and Federal Governments in investigating and prosecuting crime", they would surely have said so. That they did not suggest that the majority adhered to the holding of *Counselman*, a view which is consistent with, and expository of *Albertson*, decided a year later.

The Government likewise sees implicit approval of use-immunity in *Gardner v. Broderick*, 392 U.S. 273, 276 (Gov't Br., p. 26). But it is apparent from the opinion that the language cited in the Government's

Brief is simply descriptive of the holdings in *Counselman* and *Murphy*, and in no way is intended to endorse use-immunity. Indeed, the citation of *Counselman* by the court was to that passage which held use-immunity constitutionally inadequate.

In *Spevack v. Klein*, 385 U.S. 511, 519-520, Mr. Justice Fortas concurred with the majority that, as in *Garrity v. New Jersey, supra*, 385 U.S. 493, testimony of a public employee or State licensee compelled under threat of disciplinary sanctions cannot be used in a subsequent criminal proceeding. His opinion is concerned essentially with the soundness and applicability of the public records doctrine first enunciated in *Shapiro v. United States*, 335 U.S. 1, (1948). Nowhere does his concurring opinion mention, let alone endorse, use-immunity. In this respect, it is not insignificant that Mr. Justice White joined with the majority in both *Spevack* and *Garrity*.

Equally inapplicable are the other authorities cited by the Government's Brief (p. 26) as allegedly demonstrative of judicial approval of use-immunity. Accordingly, the holdings of *Counselman* and *Albertson* declaring use-immunity constitutionally insufficient remains as viable precedent (See: *In the Matter of Jack Korman, et al., etc., supra*, 449 F.2d 32 (Cert. pending); *United States ex rel. Catena v. Elias*, 449 F.2d 40 (C.A. 3 (1971); *In Re Grand Jury Testimony of Joanne Kinoy*, 326 F.Supp. 407 (D.C.S.D.N.Y., 1971); See also: *Piccirillo v. New York*, 400 U.S. 548. (1971) (Dissenting Opinion)).

IV.

The Statute at Bar Was Enacted Without Benefit of Accurate Analysis of This Court's Opinions Relative to the Scope of the Fifth Amendment; and in Any Event, Congress May Not Repeal a Constitutional Provision.

The Government's Brief, pp. 26-27, suggest that Congressional enactment embodied in the statute at bar is entitled to "great weight". So it is, where Congress is constitutionally empowered to act.

The Congress is without power to amend the Constitution by statute, no matter how laudable its objective or reflective its judgment (*Counselman v. Hitchcock, supra*, 142 U.S. at p. 565).

> "Nothing new can be put into the Constitution except through amendatory processes. Nothing old can be taken out without the same processes." *Ullman v. United States, supra,* 350 U.S. at p. 428.

The United States contends that the statute at bar is bottomed on Congressional judgment that transactional immunity "was no longer—if it had ever been—a constitutional requirement" (Gov't. Br. p. 26); that it reflects a "Congressional judgment that complete transactional immunity exceeds the requirements of the Fifth Amendment" (Gov't. Br. p. 31).

Regrettably, Congressional judgment seems to rest upon substantially the same analysis of *Murphy* as that advanced by the Government in its Reply Brief. The Reports of the Judiciary Committees of the House and Senate,[9] which appear to be similar, if not identical, assert—

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[9]Compare: Report of the Committee on the Judiciary, U.S. Senate, 91st Cong., 1st Sess., S. Report No. 91-617, Dec. 18,

"The Court found [in *Murphy*] that the Constitutional Privilege was adequately displaced if the witness was protected against direct or derivative use of his compelled testimony. Contrary to the Counselman decision, the court seemed to think that this was possible through the use of the 'fruit of the poisonous tree' process of derivative suppression . . .

"*If* the underlying premise of *Counselman* that there is no way to protect the witness from the derivative use of his compelled testimony has been rejected, it seems that granting immunity from prosecution rather than use of testimony is no longer constitutionally compelled on any level, State or Federal. It is not necessary to give transaction immunity against State prosecution to give a valid grant of Federal immunity."[10] (Emphasis added.)

It is apparent from petitioner's discussion of *Murphy* that the Committees' Reports misapprehend that Decision, an impression which gains momentum from the fact that neither Committee Report mentions *Albertson* at all, nor *Adams v. Maryland,* 347 U.S. 179, 182 (1954), holding the Congressional use-immunity statute there in question "does not provide 'complete' immunity 'as required by Counselman' ".

1969, at p. 53, and Report of the Committee on the Judiciary, House of Representatives, 91st Cong., 2nd Sess., H.R. Report No. 91-1188, June 15, 1970, at p. 11.

[10]The Reports (i.d.) cite for support of this thesis: *Garrity v. New Jersey, supra,* 385 U.S. 493; *Spevack v. New York, supra,* 385 U.S. 511, *Gardner v. Broderick, supra,* 392 U.S. 273; *Stevens v. Marks,* 383 U.S. 234 (1966), in which this Court expressly declined to consider whether use-immunity afforded the absolute protection required by *Counselman* and *Albertson* (383 U.S. at pp. 244-245); and *Blue v. United States,* 384 U.S. 252 (1966), in which a unanimous court again expressly failed to pass on the constitutionality of use-immunity.

In enacting the statute at bar, Congress thus appears to have been denied a complete and accurate appraisal by its judiciary committees of prevailing Fifth Amendment standards governing use-immunity. The value of Congressional judgment, therefore, is substantially weakened by its dependence upon an incorrect analysis by the statute's authors.[11]

V.

Judicial Supervision of 18 U.S.C. Civil Section 6002 Is Impeded by the Provisions of Section 6003, and Moreover, Would Not Supply the Constitutional Deficiencies Inherent in Use-Immunity.

The Government defends §6002 by arguing that, for practical reasons, there will be no prosecutions of use-immunized witnesses "in the great majority" of cases, citing as evidence the self-serving testimony and guide lines of Justice Department officials (Gov't. Br. pp. 32, 34).

The promise of non-abuse of extraordinary power is of little comfort to its victims, nor a deterrent to a despot. Already we are told that similar assurances given in support of the wire-tap statute enacted in 1968[12]

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[11]Significantly, Congress, perhaps skeptical of its Committees' analysis, hedged on complete acceptance of use-immunity, for Section 227(a) of the Organized Crime Control Act, P.L. 91-452, Section 260; 84 Stat. 930, 931, Oct. 15, 1970, postponed the repeal of transactional immunity conferred by 18 U.S.C. §2514 until 1974. Consequently, transactional immunity "before any Grand Jury or court of the United States" remains available for numerous offenses described by 18 U.S.C. §2514 and by reference, §2516, including espionage, sabotage, murder, kidnapping, bribery, racketeering, extortion and other serious crimes.

[12]Pub. L. 90-351, title III, §802. June 19, 1968, 82 Stat. 216-217, 18 U.S.C. §§2516-2517.

have been transgressed by misuse and lawless evasion.[13]

How many immunized witnesses will remain exposed to prosecution under the Government's "savings clause" is entrusted to the exclusive discretion of future Attorneys-General, and their subordinates, whose deviations from this commitment will be made, if at all, long after the promise is forgotten.

But, even if it is true that the Government intends to prosecute such witnesses in relatively few cases, surely the accommodation of so rare and ignoble an exception affords no compelling justification for this Court to overturn 80 years of judicial precedent, and now hold that a witness may be prosecuted for an offense after he has been forced, on pain of imprisonment, to incriminate himself with respect thereto.

The purpose of use-immunity, it is argued (Gov't. Br. p. 31) is to prevent "immunity baths" resulting from mistake or corruption. "Immunity baths" occur, however, not because of the Privilege, but out of legis-

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[13]See: *Los Angeles Times,* December 19, 1971, Section B, p. 2, Cols. 1-4, quoting the Chairman of the Senate Sub-Committee on Administrative Practice and Procedure as informing his Committee that: "The number of Federal wire-tapping and bugging devices installed without court authorization is substantially greater than the Executive Branch has led the public to believe." On the basis of official information, the Chairman is said to have concluded that "warrantless national security taps were left running much longer than court authorized devices in criminal cases"; and that " 'warrantless devices [in 1969 and 1970] accounted for an average of 78 to 209 days of listening per device, as compared with a 13-day per device average' for court ordered taps."

See also: *Los Angeles Times,* December 15, 1971, Part I, p. 5, Cols. 1-4, quoting extensively from a recent Report of the American Civil Liberties Union on the pervasiveness of wire-tap and electronic surveillance, and alleged official concealment thereof through publication of purportedly misleading data.

lative efforts to repeal it. Immunity is not just permitted by the statute; it is imposed. Therefore, the defects of immunity should be cured by reforming immunity, not by destroying or undermining the Privilege.

One form of "immunity bath" would be obviated by repeal of statutes granting immunity automatically and requiring the Privilege to be claimed as a condition for receiving immunity (See: *United States v. Monia*, 317 U.S. 424 (1943)). This would permit the conferring jurisdiction to decide whether, in balance, the information sought justified a grant of immunity in lieu of prosecution.

On the other hand, immunity baths, so-called, are obviated by *Murphy*, even though transactional immunity is retained as the standard. It is therefore apparent that "immunity baths" can be avoided by logical application of existing principles, as was done in *Murphy*, without displacing the Fifth Amendment Privilege itself.

"A practical reason for refraining from prosecution of" a witness asserted by the Government's Brief (p. 34), is to assure "the continued and unimpeded flow of information concerning criminal activities."[14]

But this objective is not diminished by prosecution, for the immunized witness has no alternative; he faces jail for criminal contempt if he refuses to provide in-

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[14]Earlier, the Government described the statute as an effort to ensure the flow of information "without granting a reward to those who would use the Fifth Amendment as a sword rather than a shield" (Gov't. Br. p. 9). On the other hand, the Act tears away the shield by compelling disclosure, thereby furnishing the Prosecutor with information which he may use as a sword against the witness at the latter's trial.

formation, and he risks prosecution and imprisonment if he does.

What the fear of prosecution does insure, however, as Petitioners noted in their Opening Brief, p. 32, is that the witness is more likely to say what he thinks the Government wants to hear, for fear that anything less may subject him to prosecution. Such has been the American experience under less compelling stress. (See: *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956); *Mesarosh v. United States*, 352 U.S. 1 (1956); *Flynn v. United States*, 130 F.Supp. 412 (S.D.N.Y., 1955)).

The truth is that the Government's professed policy of prosecuting use-immunized witnesses only in exceptional cases is illusory, not only because the mere threat of prosecution, coupled with the alternative threat of jail for non-cooperation, serves whatever ends the Attorney General or his subordinates deem appropriate; but also because in the so-called exceptional case, 18 U.S.C. §6003 deprives the District Court of the power to surveill those ends, or indeed, the inquisitorial methods employed in the Grand Jury room to achieve them.[15]

The Government's Brief states, p. 34, that there are "some circumstances" in which prosecution of a use-

[15]Under §6003(b), Title 18 U.S.C., an immunity Order may be sought by the United States Attorney, subject to the approval of the Attorney General or his subordinates; but, as noted in Petitioners' Brief, p. 35, the District Court is required to issue the Order upon the mere representation that 1) the witness' testimony is necessary to the public interest and 2) such individual has refused to testify or is likely to (see: App'x. pp. 54-61, 38-42). The legislative history of this provision, as disclosed by the Report of the House Judiciary Committee (see: Petitioners' Opening Brief, p. 36) evidences a congressional intent to vest exclusive control over the administration and exercise of use-immunity in the Justice Department.

immunized witness is justified. One example offered is a witness who testifies before the Grand Jury and invokes his Privilege at trial. But this is simply a waiver problem which is soluble by judicial determination irrespective of immunity. It is obvious from a reading of *In Re Neff*, 206 F.2d 149 (C.A. 3, 1953) and *Ellis v. United States*, 416 F.2d 791 (C.A. D.C., 1969) that transactional immunity had nothing whatever to do with the dichotomous results reached by those cases.

The statute at bar seems rooted in the notion that the guilty—or at least those who under the compulsion of use-immunity reveal their complicity in serious crimes—should not go free. Such, at least, is the type of exceptional case which the Government's Brief would reserve for prosecution (pp. 35, 36).

Yet, it appears inconsonant with logic or ordered liberty that the availability of so "deeply valuable"[16] a right as the Fifth Amendment Privilege against self-incrimination should be made dependent upon the discretion of a witness's prosecutor.

> "No doubt the Constitutional Privilege may, on occasion, save a guilty man from his just desert [sic]. [The Privilege] was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had too much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against future abuses by law enforcement agencies." *Ullman v. United States, supra*, 350 U.S. at p. 427.

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[16]Harlan, *J.*, concurring, *Knapp v. Schweitzer, supra*, 357 U.S. at p. 380.

The dangers of abuse inherent from use-immunity, and from the inefficiency of the tainted evidence rules necessary for its enforcement, have been detailed in Petitioners' Opening Brief, pp. 34-42; and elsewhere.[17] But the Government urges that the " 'uncertainties' of the fact-finding process are not a reason for rejecting use-immunity" because the burden of proof rests upon the prosecution (Gov't Br. pp. 36-37). The Government's answer is unconvincing because, as shown in Petitioners' Opening Brief, pp. 37-42, its burden is illusory. The Government seeks to soften this by suggesting that the witness will be protected by counsel (Gov't Br. pp. 37, 38). This contention is specious.

As the Government well knows, the accused is not permitted counsel before the Grand Jury, where the real damage to his client's interests occurs. Nor is counsel in any better position than his client to perceive what evidence is independently acquired. Indeed, Congress has made that even more difficult by amending the *Jencks Act* to preclude discovery of Grand Jury testimony until time of trial.[18]

It is not entirely accurate to assert, as the Government's Brief does at p. 37, that "the mere possibility of error in the fact-finding process has never been accepted by this court as a sufficient basis to require tota' immunity from prosecution." (See: *Brown v. Walker, supra,* 161 U.S. at p. 597). It was surely implicit in

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[17] See: *In the Matter of Jack Korman et al., supra,* 449 F.2d at pp. 34-35, n. 5; the concurring Opinion of Chief Judge Seitz in *U.S. ex rel. Catena v. Elias, supra,* 449 F.2d at p. 45; and the Opinion of Mr. Justice Brennan, dissenting in *Piccirillo v. New York,* 400 F.2d 548 at p. 552; and in the *Amicus* Brief of the Center for Constitutional Rights, pp. 25-31.

[18] 18 U.S.C. §3500(e)(3); Pub. L. 91-452, Title I, §102, Oct. 15, 1970, 84 Stat. 926.

Counselman v. Hitchcock, 142 U.S. at pp. 581-582 (quoting *Boyd v. United States,* 116 U.S. 616, 633) and in *Albertson v. Subversive Activities Control Board, supra,* 382 U.S. at p. 80, that the possibility of error in the fact-finding process, however remote, was one reason why use-immunity could never satisfy the Privilege. There is no fact-finding process when the Privilege is invoked, as there is none under transactional immunity. In the latter instance, the sole question is one of law, namely, whether the witness testified concerning the subject for which he is subsequently prosecuted. (See: *Adams v. Maryland, supra,* 347 U.S. 179; *Reina v. United States, supra,* 364 U.S. 507; *Smith v. United States,* 337 U.S. 137 (1949)).

And this question may generally be resolved simply by reviewing the Grand Jury minutes or transcript.

But with the Government in exclusive control of all the information relevant to the fact-finding process, and with the discovery thereof severely limited by statute and court rule, a use-immunized defendant is denied effective means of disproving the Government's claim that evidence was independently acquired.

Moreover, the issue of whether evidence has been independently acquired will frequently turn on the Trial Court's determination of the credibility of witnesses, the outcome of which is predictable if the accused is without means or evidence to dispute the claim, or pits the testimony of the accused and his witnesses against that of law enforcement officers or other more "respectable" sources.[19]

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[19]"There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account." *Speisser v. Randall,* 357 U.S. 513, 529 (1958).

In any event, the Government's knowledge of a use-immunized witness's defense is itself an important and useful aid in obtaining his conviction, (Compare: *Jencks v. United States,* 353 U.S. 657, 667 (1957); see: *Brown v. Walker, supra,* n. 22, *supra*), and, without more, demonstrates the incompleteness of use-immunity protection.

The Government does not seriously deny these and other dangers cited by petitioners and others;[20] but contends they are remote and speculative possibilities which are beyond the purview of the Fifth Amendment.

It is easy to dispose of a difficult claim by labeling it as remote or speculative; but the label begs the question and demeans the constitutional right involved. Moreover, such a retort sometimes proves wrong.

In *Brown v. Walker, supra,* 161 U.S. at p. 591, the majority, in upholding the constitutionality of transactional immunity, dismissed the argument that federally compelled testimony thereunder would be used by State prosecutors as "so improbable that no reasonable man would suffer it to influence his conduct" (p. 606). But this "improbability" became a reality in *Adams v. Maryland, supra,* 347 U.S. 179.

Again, in *Jack v. Kansas, supra,* 199 U.S. 372, at p. 380, the court, rejecting an attack made on the immunity statute there at bar, expressed doubt that a prosecution for the same act "would be instituted" for violation of a State and Federal law. But this court refused to follow those "cautionary words" in *Feldman v. United States,* 322 U.S. 487, 493-494, involving precisely such a bi-jurisdictional prosecution.

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[20]See n. 17, *supra.*

Moreover, the lack of adequate standards in the remoteness argument as used by the Government's Brief —and in Mr. Justice White's concurring opinion in *Murphy, supra,* pp. 102-103—renders it an inappropriate response to a constitutional claim rooted in the Privilege.

The Fifth may be invoked by a witness who perceives that an answer may incriminate him. The court, of course, is the final arbiter of whether the witness's apprehension is justified. But, as stated in *United States v. Coffey,* 198 F.2d 438, at pp. 440-441 (C.A. 3, 1952):[21]

> "[I]n determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection, incrimination may be approached by obscure and unlikely lines of inquiry."

The appropriate standard, said this court in *Hoffman v. United States,* 341 U.S. 479, at p. 489, quoted with approval in *Malloy v. Hogan,* 378 U.S. 1, 11-12 (1964) is whether it appears:

> ". . . '*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate". (Emphasis supplied).

The court stressed in *Hoffman* and *Malloy, supra,* that—

> "To sustain the Privilege, it need only be evident from the implications of the question, and the

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[21]Cited with approval in *Malloy v. Hogan,* 378 U.S. 1, 13, N. 9 (1964).

setting in which it is asked, that a responsive answer to the question, or an explanation of why it cannot be answered *might* be dangerous because injurious disclosures could result." (Emphasis supplied).

Guided by these standards, it is "perfectly clear" that answers given by a use-immunized witness might possibly—or even are resonably likely to—aid the Government in securing his conviction.

The fact is that some of the dangers dismissed by the Government as remote or speculative have in fact materialized into reality. The possibility, for example, that a prosecutor might use the Grand Jury room to gain information from a use-immunized witness for impeachment purposes was recalled from history in *Brown v. Walker, supra,* 161 U.S. 597 [see n. 2a, *supra*]; (compare: *Groshart v. United States,* 392 F. 2d 172, 180 (C.A. 9, 1968)).

The procedural obstacles encountered by a use-immunized witness seeking to disprove that evidence is tainted is insured by the *Jencks Act,* Title 18 U.S.C. §3500(e)(3), and illustrated by *Lawn v. United States,* 355 U.S. 399 (1958), which upheld convictions based on tainted Grand Jury evidence, which the Government, despite unequivocal assurances to the contrary, "inadvertently used". The Court there affirmed denials by the District Court of motions to inspect the Grand Jury transcript (Petitioner's testimony was not furnished until the trial was well in progress), and a defense request was for a hearing to determine whether the prosecution evidence was independently acquired.

The likelihood that the qualifications and exceptions imposed on exclusionary rules applied in other constitutional areas will result in convictions based on evidence

forced from the mouth of a use-immunized witness is also exemplified by *Lawn v. United States, supra,* and by several cases discussed in Petitioners' Opening Brief, pp. 39-42.

The Government's Brief concludes its defense of use-immunity by proposing that it can be administered by the same fact-finding process applied to searches and seizures and coerced confessions (Gov't. Br. pp. 38, 39).

The point is not apt because the interests and issues involved at bar are not the same as those raised in search and seizure and coerced confession cases.

The Fourth Amendment prohibits only unreasonable searches and seizures. When the question of an illegal search reaches the court, the right has long since been transgressed, if at all. The exclusionary rule, then, is a rule of deterrence; it suppresses only the fruits of *unreasonable* searches, and this, out of deference to the court's "regard for its own dignity as an agency of justice and custodian of liberty . . ." (Holmes, *J.* dissenting in *Olmstead v. United States,* 227 U.S. 438, 470 (1928)).

Similarly, the Fifth Amendment does not proscribe police interrogations, or admissions adduced therefrom. What it forbids are *forced* confessions. The exclusionary rule, while recognizing that a compelled confession may be untrue, is essentially also a rule of deterrence (*Rogers v. Richmond, supra,* 365 U.S. at pp. 543-544).

As has been shown, the exclusionary rules are imperfect; but the right having been already lost, such imperfections are deemed to be tolerable in view of the ultimate purpose they serve, namely, to encourage compliance with constitutional standards.

In no way, however, do the exclusionary rules encourage forced confessions or unreasonable searches and seizures. Their function is simply the pragmatic one of coping with constitutional rights that have been abridged collateral to the crime committed.

But here, the Court is considering whether a statute is co-extensive with the Fifth Amendment Privilege where it authorizes forced confessions which by virtue of imperfect rules and methods designed for deterrence, *might* lead to convictions based thereon.

It seems clear that the Privilege against self-incrimination would be irreparably and substantially diminished if its scope were to be entrusted to the imperfections of a fact-finding process.

Conclusion.

For the foregoing reasons, as well as those mentioned in Petitioners' Opening Brief, and in the briefs of Amicus Curiae filed herein, it is respectfully submitted that the judgments of the courts below should be reversed, and the statute at bar held unconstitutional as violative of the Fifth Amendment Privilege.

Respectfully submitted,

HUGH R. MANES,
MARGOLIS, MCTERNAN, SMITH,
SCOPE & HERRING,
By HUGH R. MANES,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 70-117

CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petition of Charles Joseph Kastigar and Michael Gorean Stewart, for Rehearing.

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IN THE

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CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petition of Charles Joseph Kastigar and Michael Gorean Stewart, for Rehearing.

To the Supreme Court of the United States and the Honorable Justices Thereof:

Come now Petitioners Charles Joseph Kastigar and Michael Gorean Stewart, Petitioners-Appellants herein, by and through their undersigned counsel, who present this, their Petition for Rehearing, and in support thereof respectfully state to the Court:

I.

On May 22, 1972, the Court entered an Opinion in the within cause, delivered by Mr. Justice Powell, in which cause Mr. Justice Douglas and Mr. Justice Marshall dissented, filing separate dissenting Opinions.

II.

Counsel for Petitioners herein respectfully submit that the Decision rendered in the above cause (1) is erroneous in that the precedents upon which it relies actually stand for the proposition advanced by Petitioners, namely that *transactional* immunity is required by and thus coterminous with the contours of the Fifth Amendment to the United States Constitution and (2) that this cause was prosecuted in bad faith by Respondents who were concomitantly prosecuting Petitioners herein for the very offenses for which they sought Petitioners' testimony, and that the cause herein was mooted prior to the date on which the Opinion was delivered. For all of the above reasons Counsel respectfully suggest that the Opinion herein be withdrawn and that this Court find the causes herein mooted, or enter a judgment reversing the decisions of the courts below.

III.

A. Concern Solely With "Evidentiary" Use Is Erroneous.

Mr. Justice Powell's Opinion demonstrates why the decision of this Honorable Court is erroneous. At page 18 of the slip opinion herein the Majority Opinion sets forth what it believes to be the main concern, indeed, the sole concern, of the Fifth Amendment in this regard, and thus the viability of the *use* immunity provisions of 18 U.S.C. §§ 6002-6003. The Opinion reads:

> Immunity from the use of compelled testimony and evidence derived directly therefrom affords [the] protection [mandated by the Fifth Amendment's privilege against self-incrimination].

The Court's Opinion, and thus the Court's concern, focuses solely on the evidentiary problems of the *use* immunity statute.

The Court arrives at this concern by mis-applying *Murphy v. Waterfront Comm'n.*, 378 U.S. 52 (1964), and by taking the rather expansive concepts of *Murphy*, which there necessarily dealt with evidentiary matters, and confining them beyond the context of that case. The Court cited the following from *Murphy*:

> [A] state witness cannot be compelled to give testimony . . . incriminating under federal law unless the . . . testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. Opinion at p. 16.

By interpreting "use" to require an evidentiary *setting*, and then by ignoring the non-evidentiary "uses" to which such testimony can be put, or to the advantages which inure in compelling damaging evidence from a witness and later trying him for the offense for which he has been required to testify, the Court has done away with years of common-law precedent and dozens of this Court's own Opinions.

This Court ignores, or attempts to distinguish as *dicta* its holding in *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and would have us think, eighty years after *Counselman* became settled, respected precedent, that the Supreme Court's interpretation in 1892 of the Fifth Amendment could be considered a zealous and inarticulate exercise. There this Court wrote

> a statutory enactment [compelling testimony], to be valid, must afford absolute immunity against future prosecution for the offense to which the question [or interrogation] relates.

[142 U.S. at 586]. To assert now that the *Counselman* Court meant merely that a statute which did not provide *use* immunity was void turns the truth on its head. The Court was then concerned with whether any kind of immunity could displace the privilege against self-incrimination. The argument was not as this Court would have us believe, *use* immunity versus *transactional* immunity.[1] Rather it is clear from *Counselman* that the concern was with whether even transactional immunity was constitutionally sufficient. This Court's novel interpretation of *Counselman* thus turns the opinion on its side and from that angle discusses the factors which underpinned the holding. It is, we submit, this conceptual inaccuracy which causes the Court to shake 80 years of settled precedent.

Further, there are a number of other non-"evidentiary" benefits derived by the prosecution if it is permitted free-wheeling discovery and subsequent prosecution of unwilling witnesses under *use* immunity statutes:

1. The *psychological pressure* of previous testimony in itself may prove so great as to force a previously compelled witness to abandon his right to trial and confrontation of the witnesses against him; such a use of psychological pressure has been severely condemned by this Court often. *See, e.g., Miranda v. Arizona,* 384 U.S. 436 (1965).

2. Because the compelled witness may wish to insure no use whatsoever will be made of his testimony, and because as this Court pointed out in the Opinion

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[1]Indeed, by claiming the *Counselman* holding was *dictum* the Court necessarily requires us to believe that at issue was a *limited* use immunity statute. (See Opinion at pp. 13-14.)

herein the kinds of cases in which immunity will be granted necessarily involve multiple defendants or co-conspirators (Opinion at p. 6), the compelled witness may as a matter of course cast *as wide an incriminating net as possible,* thus tainting the reliability of his own testimony while facilitating the Government's efforts in convicting the compelled witness' alleged confederates with suspect testimony.

3. Again, because there will usually be a number of indictments brought when "valuable" testimony is elicited from an unwilling witness, the publicity attendant with the handing down of *other* indictments, which may publicize the testimony of the compelled witness, by stating his role and the information upon which the other indictments were issued, will serve to deny the unwilling witness a fair and impartial trial; and because as this Court's Opinion so rightly pointed out the *use* immunity statute will probably be used in cases of great public importance, concern and interest, (see p. 6) this danger is very real. *Use* immunity and a series of subsequent indictments really permits the insidious invasion into the compelled witness' case-in-chief of testimony publicized beyond the sterile court room setting.

4. The *use* immunity statute further denies due process wherein it permits the Government's massive resources to focus in on the compelled witness and insures that a fire will be found where there may be smoke. Given the vast funds available to the Government and the huge investigatory network at its command, the *use* immunity testimony permits the Government to bring a disproportionate amount of its resources to bear against the unwilling witness. This Court's Opinion totally mis-treats this issue, confusing

"evidentiary" use with "investigatory use" (Opinion at p. 20). There simply is no way to determine what advantages inured to the Government in the compelled testimony unless the Government is required to prove, at every step of its investigation, that the resources it brought to bear, the modes of investigation, and the theories of its case were not in some way advantaged or aided by the "lead" of the compelled testimony (*Cf. Wong Sun v. United States,* 371 U.S. 471 (1963)). The Court's reliance upon the "burden of proof" placed upon the Government as the prophylactic device to wash away the evils here-mentioned is a slender reed indeed. As to what aspects of its case must the Government prove it was not advantaged? What must the Government bring forward to discharge its burden? If history is any guide, then as in the wiretap and voluntary confession arenas the Government will attempt to discharge its burden with as little hard evidence as it can get away with, probably a mere affidavit of some middle-level investigator that this case was just the usual kind of case. And then the burden will shift, not imperceptibly but onerously, upon the Defendant, to try to prove just in which of a thousand ways the Government was (not might have been) advantaged.

The concern of the Courts has never been placed solely upon "evidentiary use". Perhaps not often articulated, the subtle pressures which surround testimonial compulsion and subsequent prosecution for the transaction involved have led this Court to require in its settled precedent full, plenary transactional immunity.

The Court's efforts herein to create from clear, settled precedent a flotilla of ambiguities and to steer a tendentious course through the fleet, shipwrecks the Fifth Amendment.

B. This Cause Was Prosecuted by the Government in Bad Faith Since the Government Was Also Prosecuting Petitioners Herein for the Very Transactions for Which "Use" Immunity Was Offered.

A very clear example of one of the abuses of "use" immunity has occurred in the cases at Bar. After attempting to elicit incriminating information from the Petitioners herein the Government sought to insure that Petitioners would be ensnared in a web, even if not of their own making.

One very real danger of "use" immunity statutes is that they may tend to compound the punishment for single offenses by pyramiding contempt sentences upon the possible sanctions for violating the substantive law under investigation. Further combined with the possible prosecution also available to the Government for perjury and the rendition of false statements (see Opinion at p. 8) the *use* immunity statute permits the Government, which already has inherent prosecutorial and resource advantages over defendants yet another device to ensnare and entrap and to exert powerful pressures. In these very cases the Government decided soon after the Petitioners herein refused to testify that it would prosecute them no matter what their performance before the Grand Jury. From what seems to be information wholly available to the Government on February

11, 1971 (the date on which each of the Petitioners herein refused to testify) the Government thereafter sought an indictment against each of the Petitioners herein. On July 12, 1971 Petitioner Kastigar was indicted by the Grand Jury on a one-count conspiracy charge. (See Indictment No. 8462-CD appended hereto as Exhibit A to Petition for Rehearing.) Petitioner Stewart was subsequently indicted on January 31, 1972 on a two-count indictment. (See Indictment No. 9577 appended hereto as Exhibit B.)

Petitioner Kastigar was subsequently adjudged Guilty on November 11, 1971. Petitioner Stewart was subsequently adjudged Not Guilty on Count one on April 4, 1972 and Not Guilty on Count two on May 1, 1972. Despite the fact that the trials and judgments occurred prior to the rendition of the Opinion herein, and that the Government's need for the testimony which may have existed on February 11, 1971 was no longer necessary, (the trial of the alleged co-conspirator, Dr. Bernard Bender, having also ended prior to the rendition of the judgment herein) and that the Grand Jury was no longer sitting, yet the Government pressed forward with the defense of this action which was then probably moot.

IV.

Conclusion.

As this Court said in *Ullmann v. United States,* 350 U.S. 422, 438 (1956), transactional immunity statutes have "become a part of our constitutional fabric."[2] The decision herein weaves a discordant and disrup-

[2]The use of this phrase by the Majority herein to support the proposition that *use* immunity is part of our constitutional fabric is, with all due respect, disingenuous and intellectually dishonest.

tive thread through the protective cloth that is the Fifth Amendment and weakens and stresses the Great Amendment's very seams at a cost much greater than any benefits which could possibly inure to the Government. For all of the above reasons counsel for Petitioners respectfully suggest that the Court withdraw its Opinion herein and reconsider the issues here at Bar.

Respectfully submitted,

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WILLIAM G. SMITH, ESQ.,
By HUGH R. MANES, ESQ.,
Attorneys for Petitioners.

Of Counsel:

MARGOLIS, MCTERNAN, SMITH,
SCOPE & HERRING,
Attorneys for Petitioner Stewart.

Verification of Attorney.

I, Hugh R. Manes, one of the attorneys herein, do hereby verify that this Petition for Rehearing is presented in Good Faith and not for purposes of delay.

Dated: June 15, 1972.

Hugh R. Manes

HUGH R. MANES

EXHIBIT A.

Indictment [50 U.S.C. App. §462—Military Selective Service Act of 1967: Conspiracy].

United States District Court, Central District of California, September 1970 Grand Jury.

United States of America, Plaintiff, v. Charles Joseph Kastigar, Defendant. No. 8462 CD.

FILED: July 12, 1971.

The Grand Jury charges:

[50 U.S.C. App. 462]

Commencing about May 20, 1970 and continuing until the return of this indictment, in Los Angeles County, within the Central District of California, defendant CHARLES JOSEPH KASTIGAR and unindicted co-conspirator Bernard Bender agreed, confederated and conspired together to commit offenses against the United States as follows:

(a) to make and cause the making of false statements bearing upon the selective service classification of defendant KASTIGAR,

(b) to cause the making of a false, improper and incorrect selective service classification and physical examination of defendant KASTIGAR, and

(c) to evade service by defendant KASTIGAR in the armed forces of the United States.

The objects of the conspiracy would be accomplished as follows: Defendant KASTIGAR, desiring to avoid service in the armed forces of the United States would be referred to and contact unindicted co-conspirator Bernard Bender, who was then engaged in the prac-

tice of dentistry. Co-conspirator Bender would agree with defendant KASTIGAR to fit defendant KASTIGAR with orthodontic appliances. Shortly before defendant KASTIGAR was scheduled to report to the Armed Forces Examination and Entrance Station, co-conspirator Bender would place orthodontic appliances on defendant KASTIGAR'S teeth. Co-conspirator Bender would also furnish defendant KASTIGAR a letter indicating that defendant was a genuine dental patient then undergoing legitimate and active orthodontic treatment by co-conspirator Bender. Thereafter, defendant KASTIGAR would report to the Armed Forces Examination and Entrance Station with the orthodontic appliances on his teeth and with the letter in his possession, and would be rejected for military service in consequence thereof. Shortly thereafter, defendant KASTIGAR would return to the office of co-conspirator Bender where co-conspirator Bender would remove the orthodontic appliances from defendant KASTIGAR'S teeth. Co-conspirator Bender and defendant KASTIGAR would make arrangements to replace the orthodontic appliances on defendant KASTIGAR'S teeth temporarily in the event that defendant KASTIGAR should be recalled for future armed forces physical examination or induction;

All in violation of 50 U.S.C. App. 462.

A TRUE BILL
[Illegible]
Foreman

/s/ Robert L. Meyer
ROBERT L. MEYER
United States Attorney

EXHIBIT B.

Indictment [18 U.S.C. §371: Conspiracy to Violate Military Selective Service Act of 1967; 50 U.S.C. App. §462: Military Selective Service Act of 1967; Failure to Report Change in Physical Condition].

United States District Court, for the Central District of California, September 1971 Grand Jury.

United States of America, Plaintiff, v. Michael Gorean Stewart, Defendant. No. 9577 CD.

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §371]

Commencing prior to May 27, 1970, and continuing to on or about July 1, 1971, in Los Angeles County, within the Central District of California, defendant, MICHAEL GOREAN STEWART, and various other unindicted co-conspirators, including Dr. Bernard Bender, and other persons known and unknown to the Grand Jury, agreed, confederated, and conspired together to commit one or more of the following offenses against the United States of America.

a. Knowingly and wilfully cause the defendant, MICHAEL GOREAN STEWART, to evade service in the armed forces of the United States, in violation of Title 50, United States Code, Appendix, Section 462.

b. Knowingly cause the defendant, MICHAEL GOREAN STEWART, to undergo a false, improper, and incorrect physical examination at the Armed Forces Entrance and Examining Station, in violation of Title 50, United States Code, Appendix, Section 462.

c. Knowingly cause to be made a false, improper, and incorrect classification of defendant, MICHAEL

GOREAN STEWART, by Local Board No. 121, in violation of Title 50, United States Code, Appendix, Section 462.

d. Knowingly cause the defendant, MICHAEL GOREAN STEWART, to fail and neglect to inform his local board of a fact which might result in his being placed in a different classification, in violation of Title 50, United States Code, Appendix, Section 462.

The objects of the conspiracy were to be accomplished as follows:

Selective Service registrants, including the defendant, MICHAEL GOREAN STEWART, and other unindicted co-conspirators, would contact Dr. Bernard Bender, a dentist practicing in Canoga Park, California, to have orthodontic appliances placed on their teeth for the purpose of falsely representing to the Selective Service System that they would be undergoing active orthodontic treatment. Dr. Bender would ascertain the selective service status of the registrants, including that of the defendant, MICHAEL GOREAN STEWART. Impressions of the registrants' teeth would then be taken so that orthodontic bands could be made before the registrants needed them for draft evasion purposes.

Shortly before each registrant was scheduled to report for induction at the Armed Forces Examination and Entrance Station, Dr. Bernard Bender would place orthodontic appliances on the registrants' teeth, including defendant, MICHAEL GOREAN STEWART. The registrants would then report to the Armed Forces Examination and Entrance Station with the orthodontic appliances on their teeth. At that time the registrants would falsely represent that they were undergoing active orthodontic treatment which would continue for a

considerable period of time in the future. As a consequence of the representation, the registrants would be found disqualified from Military service and would be classified 1-Y as unfit for service for a period of time. Shortly after this disqualification, and without any notification by anyone to selective service or the Armed Forces Entrance and Examination Station, either Dr. Bernard Bender or the registrant would remove the orthodontic appliances from the registrant's teeth.

To effect one or more of the objects of the conspiracy, defendant, MICHAEL GOREAN STEWART, and his unindicted co-conspirators, including Dr. Bernard Bender, committed various overt acts in the Central District of California, and elsewhere, including the following:

1. On or about May 20, 1970, the defendant, MICHAEL GOREAN STEWART, visited Dr. Bernard Bender and had impressions taken of his teeth for the making of orthodontic bands.

2. On or about September 8, 1970, the defendant, MICHAEL GOREAN STEWART, had the bands inserted in his mouth by Dr. Bender.

3. On September 15, 1970, the defendant, MICHAEL GOREAN STEWART, appeared for induction at the Armed Forces Entrance and Examination Station and represented that he had been undergoing active orthodontic treatment by Dr. Bernard Bender.

4. On various dates after September 15, 1970, the defendant, MICHAEL GOREAN STEWART, was seen without orthodontic appliances on his teeth, and the defendant did not advise his local board that his braces had been removed.

COUNT TWO

[50 U.S.C. App. §462]

Defendant, MICHAEL GOREAN STEWART, a person charged with the duty of carrying out provisions of the Military Selective Service Act of 1967, Title 50, United States Code, Appendix, Section 451-471, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 121, said Board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, within the Central District of California; and during the period commencing before December 11, 1970, to July 1, 1971, the defendant knowingly failed and neglected to perform a duty required of him under said Act and the regulations promulgated thereunder in that shortly before he reported for induction on September 15, 1970, defendant, MICHAEL GOREAN STEWART, had dental braces placed on his teeth; on September 15, 1970, he reported for induction and was found disqualified for induction because he then wore dental braces and claimed to be undergoing active orthodontic treatment; shortly afterward, he removed the dental braces from his teeth and knowingly failed and neglected to report to Local Board 121 the fact that he no longer wore braces and was not undergoing active orthodontic treatment, a fact regarding defendant's physical condition which might result in his being placed in a different classification.

A TRUE BILL
[Illegible]
Foreman

/s/ William D. Keller
WILLIAM D. KELLER
United States Attorney

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KASTIGAR ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–117. Argued January 11, 1972—Decided May 22, 1972

The United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity, as provided by 18 U. S. C. § 6002, from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings, as such immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege. Transactional immunity would afford broader protection than the Fifth Amendment privilege, and is not constitutionally required. In a subsequent criminal prosecution, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony. Pp. 2–22.

440 F. 2d 954, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS and MARSHALL, JJ., filed dissenting opinions. BRENNAN and REHNQUIST, JJ., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revisi . before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter o. Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70–117

Charles Joseph Kastigar and Michael Gorean Stewart, Petitioners, *v.* United States.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 22, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California on February 4, 1971. The Government believed that petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearances, the Government applied to the District Court for an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 U. S. C. § 6002–6003. Petitioners opposed issuance of the order, contending primarily that the scope of the immunity provided by the statute was not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony.

The District Court rejected this contention, and ordered petitioners to appear before the grand jury and answer its questions under the grant of immunity.

Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination. They were brought before the District Court, and each persisted in his refusal to answer the grand jury's questions, notwithstanding the grant of immunity. The court found both in contempt, and committed them to the custody of the Attorney General until either they answered the grand jury's questions or the term of the grand jury expired.[1] The Court of Appeals for the Ninth Circuit affirmed. *Stewart* v. *United States*, 440 F. 2d 954 (CA9 1971). This Court granted certiorari to resolve the important question whether testimony may be compelled by granting immunity from the use of the compelled testimony and evidence derived therefrom ("use and derivative use" immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ("transactional" immunity). 402 U. S. 971 (1971).

I

The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence.[2] The power with respect to courts was established by statute in England as early as 1562,[3] and Lord Bacon observed in 1612 that all subjects owed the King

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[1] The contempt order was issued pursuant to 28 U. S. C. § 1826.

[2] For a concise history of testimonial compulsion prior to the adoption of our Constitution, see 8 J. Wigmore, Evidence § 2190 (McNaughton rev. 1961). See *Ullmann* v. *United States*, 350 U. S. 422, 439 n. 15 (1956); *Blair* v. *United States*, 250 U. S. 273 (1919).

[3] Statute of Elizabeth, 5 Eliz. I, c. 9, § 12 (1562).

their "knowledge and discovery."[4] While it is not clear when grand juries first resorted to compulsory process to secure the attendance and testimony of witnesses, the general common law principle that "the public has a right to every man's evidence" was considered an "indubitable certainty" which "cannot be denied" by 1742.[5] The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor. The first Congress recognized the testimonial duty in the Judiciary Act of 1789, which provided for compulsory attendance of witnesses in the federal courts.[6] MR. JUSTICE WHITE noted the importance of this essential power of government in his concurring opinion in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 93–94 (1964):

> "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See *Blair* v. *United States*, 250 U. S. 273. Such testimony constitutes one of the Government's primary sources of information."

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[4] *Countess of Shrewsbury's Case*, 2 Howell's State Trials 769, 778 (1612).

[5] See the parliamentary debate on the Bill to Indemnify Evidence, particularly the remarks of the Duke of Argyle and Lord Chancellor Hardwicke, reported in 12 T. Hansard, Parliamentary History of England 675, 693 (1812). See also *Piemonte* v. *United States*, 367 U. S. 556, 559 n. 2 (1961); *Ullmann* v. *United States*, 350 U. S. 422, 439 n. 15 (1956); *Brown* v. *Walker*, 161 U. S. 591, 600 (1896).

[6] 1 Stat. 73, 88–89 (1789).

But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty,[7] the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations,[8] and marks an important advance in the development of our liberty.[9] It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory;[10] and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.[11] This Court has been zealous to safeguard the values which underlie the privilege.[12]

Immunity statutes, which have historical roots deep in Anglo-American jurisprudence,[13] are not incompatible

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[7] See *Blair* v. *United States*, 250 U. S. 273, 281 (1919); 8 J. Wigmore, Evidence §§ 2192, 2197 (McNaughton rev. 1961).

[8] See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964).

[9] See *Ullmann* v. *United States*, 350 U. S. 422, 426 (1956), E. Griswold, The Fifth Amendment Today 7 (1955).

[10] *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 94 (1964) (WHITE, J., concurring); *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924); *United States* v. *Saline Bank*, 26 U. S. (1 Peters) 100 (1828); cf. *Gardner* v. *Broderick*, 392 U. S. 273 (1968).

[11] *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Blau* v. *United States*, 340 U. S. 159 (1950); *Mason* v. *United States*, 244 U. S. 362, 365 (1917).

[12] See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436, 443–444 (1966); *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

[13] Soon after the privilege against compulsory self-incrimination became firmly established in law, it was recognized that the privilege did not apply when immunity, or "indemnity," in the English usage, had been granted. See L. Levy, Origins of the Fifth Amendment 328, 495 (1968). Parliament enacted an immunity statute in 1710 directed against illegal gambling, 9 Anne, c. 14, §§ 3–4 (1710), which became the model for an identical immunity statute enacted in 1774 by the Colonial Legislature of New York. Law of March 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894). These

with these values. Rather they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens

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statutes provided that the loser could sue the winner, who was compelled to answer the loser's charges. After the winner responded and returned his ill-gotten gains, he was "acquitted, indemnified [immunized] and discharged from any further or other Punishment, Forfeiture or Penalty, which he . . . may have incurred by the playing for, and winning such Money . . . ." 9 Anne, c. 14, § 4 (1710); Law of March 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894).

Another notable instance of the early use of immunity legislation is the 1725 impeachment trial of Lord Chancellor Macclesfield. The Lord Chancellor was accused by the House of Commons of the sale of public offices and appointments. In order to compel the testimony of Masters in Chancery who had allegedly purchased their offices from the Lord Chancellor, and who could incriminate themselves by so testifying, Parliament enacted a statute granting immunity to persons then holding office as Masters in Chancery. *Lord Chancellor Macclesfield's Trial,* 16 Howell's State Trials 767, 1147 (1725). See 8 J. Wigmore, Evidence § 2281, at 492 (McNaughton rev. 1961). See also *Bishop Atterbury's Trial,* 16 Howell's State Trials 323, 604–605 (1723). The legislatures in colonial Pennsylvania and New York enacted immunity legislation in the 18th century. See, *e. g.,* Resolution of January 6, 1758, in Votes and Proceedings of the House of Representatives of the Province of Pennsylvania (1682–1776), 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed. 1935); Law of March 24, 1772, c. 1542, 5 Colonial Laws of New York 351, 353–354 (1894); Law of March 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894); Law of March 9, 1774, c. 1655, 5 Colonial Laws of New York 639, 641–642 (1894). See generally L. Levy, Origins of the Fifth Amendment 359, 384–385, 389, 402–403 (1968). Federal immunity statutes have existed since 1857. Act of Jan. 24, 1857, 11 Stat. 155. For a history of the various federal immunity statutes, see Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568 (1963); Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 St. Louis U. L. Rev. 327 (1966); and National Commission on Reform of Federal Criminal Laws, Working Papers, 1406–1411 (1970)

to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses,[14] and their primary use has been to investigate such offenses.[15] Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century.[16] Indeed, prior to the enactment of the

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[14] See, *e. g.*, Resolution of January 6, 1758, in Votes and Proceedings of the House of Representatives of the Province of Pennsylvania (1682–1776), 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed. 1935); Law of March 24, 1772, c. 1542, 5 Colonial Laws of New York 351, 354 (1894); Law of March 9, 1774, c. 1655, 5 Colonial Laws of New York 639, 642 (1894). *Bishop Atterbury's Trial*, 16 Howell's State Trials 323 (1723), for which the House of Commons passed immunity legislation, was a prosecution for treasonable conspiracy. See 16 Howell's State Trials, at 604–605 (1723); 8 J. Wigmore, Evidence § 2281, at 492 n. 2 (McNaughton rev. 1961). *Lord Chancellor Macclesfield's Trial*, 16 Howell's State Trials 767 (1725), for which Parliament passed immunity legislation, was a prosecution for political bribery involving the sale of public offices and appointments. See 16 Howell's State Trials, at 1147 (1725). The first federal immunity statute was enacted to facilitate an investigation of charges of corruption and vote buying in the House of Representatives. See Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568, 1571 (1963).

[15] See 8 J. Wigmore, Evidence § 2281, at 492 (McNaughton rev. 1961). MR. JUSTICE WHITE noted in his concurring opinion in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 92 (1964), that immunity statutes "have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable, such as political bribery, extortion, gambling, consumer frauds, liquor violations, commercial larceny, and various forms of racketeering." 378 U. S., at 94–95. See n. 14, *supra*.

[16] See Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568, 1576 (1963).

statute under consideration in this case, there were in force over 50 federal immunity statutes.[17] In addition, every State in the Union, as well as the District of Columbia and Puerto Rico, has one or more such statutes.[18] The commentators,[19] and this Court on several occasions,[20] have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in *Ullmann* v. *United States*, 350 U. S. 422 (1956), such statutes have "become part of our constitutional fabric." [21] 350 U. S., at 438.

II

Petitioners contend first that the Fifth Amendment's privilege against compulsory self-incrimination, which is that "no person . . . shall be compelled in any criminal case to be a witness against himself," deprives Congress of power to enact laws which compel self-incrimination, even if complete immunity from prosecution is granted prior to the compulsion of the incriminatory testimony. In other words, petitioners assert that no immunity statute, however drawn, can afford a lawful basis for com-

[17] For a listing of these statutes, see National Commission on Reform of Federal Criminal Laws, Working Papers, 1444–1445 (1970).

[18] For a listing of these statutes, see 8 J. Wigmore, Evidence § 2281, at 495 n. 11 (McNaughton rev. 1961).

[19] See, *e. g.*, 8 J. Wigmore, Evidence § 2281, at 501 (3d ed. 1940); 8 J. Wigmore, Evidence § 2281, at 496 (McNaughton rev. 1961).

[20] See *Hale* v. *Henkel*, 201 U. S. 43, 70 (1906); *Brown* v. *Walker*, 161 U. S. 591, 610 (1896).

[21] This statement was made with specific reference to the Compulsory Testimony Act of 1893, 27 Stat. 443, the model for almost all federal immunity statutes prior to the enactment of the statute under consideration in this case. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 95 (1964) (WHITE, J., concurring).

pelling incriminatory testimony. They ask us to reconsider and overrule *Brown* v. *Walker*, 161 U. S. 591 (1896), and *Ullmann* v. *United States*, 350 U. S. 422 (1956), decisions which uphold the constitutionality of immunity statutes.[22] We find no merit to this contention and reaffirm the decisions in *Brown* and *Ullmann*.

III

Petitioners' second contention is that the scope of immunity provided by the federal witness immunity statute, 18 U. S. C. § 6002, is not coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination, and therefore is not sufficient to supplant the privilege and compel testimony over a claim of the privilege. The statute provides that when a witness is compelled by district court order to testify over a claim of the privilege:

> "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." [23] 18 U. S. C. § 6002.

The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with

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[22] Accord, *Gardner* v. *Broderick*, 392 U. S. 273, 276 (1968); *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *McCarthy* v. *Arndstein*, 266 U. S. 34, 42 (1924) (Brandeis, J.); *Heike* v. *United States*, 227 U. S. 131, 142 (1913) (Holmes, J.).

[23] For other provisions of the 1970 Act relative to immunity of witnesses, see 18 U. S. C. §§ 6001–6005.

the scope of the privilege.[24] If so, petitioners' refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers against which the privilege protects. *Brown* v. *Walker*, 161 U. S. 591 (1896). If, on the other hand, the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgments of contempt must be vacated. *McCarthy* v. *Arndstein*, 266 U. S. 34, 42 (1924).

Petitioners draw a distinction between statutes which provide transactional immunity and those which provide, as does the statute before us, immunity from use and derivative use.[25] They contend that a statute must at a minimum grant full transactional immunity in order to be coextensive with the scope of the privilege. In support of this contention, they rely on *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), the first case in which this Court considered a constitutional challenge to an immunity statute. The statute, a re-enactment of the Immunity Act of 1868,[26] provided that no "evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States. . . ." [27] Notwithstanding a grant of immunity and order to testify under the revised 1868 Act, the witness, asserting his privilege against compulsory self-incrimination, refused to testify before a federal grand jury. He was consequently adjudged in contempt of court.[28] On appeal, this Court construed the statute as

[24] See, *e. g.*, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 54, 78 (1964); *Counselman* v. *Hitchcock*, 142 U. S. 547, 585 (1892).

[25] See *Piccirillo* v. *New York*, 400 U. S. 548 (1971).

[26] 15 Stat. 37 (1868).

[27] See *Counselman* v. *Hitchcock*, 142 U. S. 547, 560 (1892).

[28] *In re Counselman*, 44 Fed. 268 (CCND Ill. 1890).

affording a witness protection only against the use of the specific testimony compelled from him under the grant of immunity. This construction meant that the statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him." [29] Since the revised 1868 Act, as construed by the Court, would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him. Accordingly, under the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege,[30] the witness' refusal to testify was held proper. In the course of its opinion, the Court made the following statement, on which petitioners heavily rely:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. [The immunity statute under consideration] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." 142 U. S., at 585–586.

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[29] *Counselman* v. *Hitchcock*, 142 U. S. 547, 564 (1892).

[30] Precisely, the Court held "that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply [*sic*] one, at least unless it is so broad as to have the same extent in scope and effect." 142 U. S., at 585. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 54, 78 (1964).

Sixteen days after the *Counselman* decision, a new immunity bill was introduced by Senator Cullom,[31] who urged that enforcement of the Interstate Commerce Act would be impossible in the absence of an effective immunity statute.[32] The bill, which became the Compulsory Testimony Act of 1893,[33] was drafted specifically to meet the broad language in *Counselman* set forth above.[34] The new Act removed the privilege against self-incrimination in hearings before the Interstate Commerce Commission and provided that:

> "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise. . . ." Act of Feb. 11, 1893, 27 Stat. 444.

This transactional immunity statute became the basic form for the numerous federal immunity statutes[35] until 1970, when, after re-examining applicable constitutional principles and the adequacy of existing law, Congress enacted the statute here under consideration.[36] The new

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[31] *Counselman* was decided Jan. 11, 1892. Senator Cullom introduced the new bill on Jan. 27, 1892. 23 Cong. Rec. 573 (1892).

[32] 23 Cong. Rec. 6333 (1892).

[33] Act of February 11, 1893, 27 Stat. 443, repealed by the Organized Crime Control Act of 1970, Pub. L. No. 91–452, § 245, 84 Stat. 931.

[34] See the remarks of Senator Cullom, 23 Cong. Rec. 573, 6333 (1892), and Congressman Wise, who introduced the bill in the House. 24 Cong. Rec. 503 (1893). See *Shapiro* v. *United States*, 335 U. S. 1, 28–29 and n. 36 (1948).

[35] *Ullmann* v. *United States*, 350 U. S. 422, 438 (1956); *Shapiro* v. *United States*, 335 U. S. 1, 6 (1948). There was one minor exception. See *Piccirillo* v. *New York*, 400 U. S. 548, 571 and n. 11 (1971) (BRENNAN, J., dissenting); *Arndstein* v. *McCarthy*, 254 U. S. 71, 73 (1920).

[36] The statute is a product of careful study and consideration by the National Commission on Reform of Federal Criminal Laws, as well as by Congress. The Commission recommended legislation to reform the federal immunity laws. The recommendation served

statute, which does not "afford [the] absolute immunity against future prosecution" referred to in *Counselman*, was drafted to meet what Congress judged to be the conceptual basis of *Counselman*, as elaborated in subsequent decisions of the Court, namely, that immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege.[37]

The statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testi-

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as the model for this statute. In commenting on its proposal in a special report to the President, the Commission said:

"We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers." Second Interim Report of the National Commission on Reform of Federal Criminal Laws, March 17, 1969, Working Papers of the Commission, 1446 (1970).

The Commission's recommendation was based in large part on a comprehensive study of immunity and the relevant decisions of this Court prepared for the Commission by Prof. Robert G. Dixon, Jr., of the George Washington University Law Center, and transmitted to the President with the recommendations of the Commission. See National Commission on Reform of Federal Criminal Laws, Working Papers, 1405–1444 (1970).

[37] See S. Rep. No. 91–617, 91st Cong., 1st Sess., 51–56, 145 (1969); H. R. Rep. No. 91–1549, 91st Cong., 2d Sess., 42 (1970).

mony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.' " [38] Immunity from the use of compelled testimony and evidence derived directly and indirectly therefrom affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Our holding is consistent with the conceptual basis of *Counselman*. The *Counselman* statute, as construed by the Court, was plainly deficient in its failure to prohibit the use against the immunized witness of evidence derived from his compelled testimony. The Court repeatedly emphasized this deficiency, noting that the statute:

> "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . ." 142 U. S., at 564,

that it:

> "could not prevent the obtaining and the use of witnesses and evidence which should be attributable

[38] *Ullmann* v. *United States*, 350 U. S. 422, 438–439 (1956), quoting *Boyd* v. *United States*, 116 U. S. 616, 634 (1886). See *Knapp* v. *Schweitzer*, 357 U. S. 371, 380 (1958).

> directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." 142 U. S., at 564,

and that it:

> "affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." 142 U. S., at 586.

The basis of the Court's decision was recognized in *Ullmann* v. *United States*, 350 U. S. 422 (1956), in which the Court reiterated that the *Counselman* statute was insufficient:

> "because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution *based on knowledge and sources of information obtained from the compelled testimony.*" 350 U. S., at 437. (Emphasis supplied.)

See also *Arndstein* v. *McCarthy*, 254 U. S. 71, 73 (1920). The broad language in *Counselman* relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority.[39]

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[39] Cf. The Supreme Court, 1963 Term, 78 Harv. L. Rev. 179, 230 (1964). Language similar to the *Counselman* dictum can be found in *Brown* v. *Walker*, 161 U. S. 591, 594–595 (1896), and *Hale* v. *Henkel*, 201 U. S. 43, 67 (1906). *Brown* and *Hale*, however, involved statutes which were clearly sufficient to supplant the privilege against self-incrimination, as they provided full immunity from prosecution "for and on account of any transaction, matter or thing, concerning which he may testify or produce evidence. . . ." 161 U. S., at 594; 201 U. S., at 66. The same is true of *Smith* v. *United States*, 337 U. S. 137, 141, 146 (1949), and *United States* v. *Monia*, 317 U. S. 424, 425, 428 (1943). In *Albertson* v. *Subversive Activities Con-*

In *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964), the Court carefully considered immunity from use of compelled testimony and evidence derived therefrom. The *Murphy* petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor. After refusing to answer certain questions on the ground that the answers might tend to incriminate them, petitioners were granted immunity from prosecution under the laws of New Jersey and New York.[40] They continued to refuse to testify, however, on the ground that their answers might tend to incriminate them under federal law, to which the immunity did not purport to extend. They were adjudged in civil contempt, and that judgment was affirmed by the New Jersey Supreme Court.[41]

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trol Board, 382 U. S. 70 (1965), some of the *Counselman* language urged upon us by petitioners was again quoted. But *Albertson*, like *Counselman*, involved an immunity statute which was held insufficient for failure to prohibit the use of evidence derived from compelled admissions and the use of compelled admissions as an "investigatory lead." 382 U. S., at 80.

In *Adams* v. *Maryland*, 347 U. S. 179, 182 (1954), and in *United States* v. *Murdock*, 284 U. S. 141, 149 (1931), the *Counselman* dictum was referred to as the principle of *Counselman*. The references were in the context of ancillary points not essential to the decisions of the Court. The *Adams* Court did note, however, that the Fifth Amendment privilege prohibits the "use" of compelled self-incriminatory testimony. 347 U. S., at 181. In any event, the Court in *Ullmann* v. *United States*, 350 U. S. 422, 436–437 (1956), recognized that the rationale of *Counselman* was that the *Counselman* statute was insufficient for failure to prohibit the use of evidence derived from compelled testimony. See also *Arndstein* v. *McCarthy*, 254 U. S. 71, 73 (1920).

[40] The Waterfront Commission of New York Harbor is a bistate body established under an interstate compact approved by Congress. 67 Stat. 541 (1953).

[41] *In re Application of Waterfront Comm'n of N. Y. Harbor*, 39 N. J. 436, 189 A. 2d 36 (1963).

The issue before the Court in *Murphy* was whether New Jersey and New York could compel the witnesses, whom these States had immunized from prosecution under their laws, to give testimony which might then be used to convict them of a federal crime. Since New Jersey and New York had not purported to confer immunity from federal prosecution, the Court was faced with the question what limitations the Fifth Amendment privilege imposed on the prosecutorial powers of the Federal Government, a nonimmunizing sovereign. After undertaking an examination of the policies and purposes of the privilege, the Court overturned the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.[42] The Court held that the privilege protects state witnesses against incrimination under federal as well as state law, and federal witnesses against incrimination under state as well as federal law. Applying this principle to the state immunity legislation before it, the Court held the constitutional rule to be that:

> "a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the inter-

[42] Reconsideration of the rule that the Fifth Amendment privilege does not protect a witness in one jurisdiction against being compelled to give testimony which could be used to convict him in another jurisdiction was made necessary by the decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), in which the Court held the Fifth Amendment privilege applicable to the States through the Fourteenth Amendment. *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 57 (1964).

ests of the State and Federal Government in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." [43] 378 U. S., at 79.

The Court emphasized that this rule left the state witness and the Federal Government, against which the witness had immunity only from the *use* of the compelled testimony and evidence derived therefrom, "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." 378 U. S., at 79.

It is true that in *Murphy* the Court was not presented with the precise question presented by this case, whether a jurisdiction seeking to compel testimony may do so by granting only use and derivative use immunity, for New Jersey and New York had granted petitioners transactional immunity. The Court heretofore has not squarely confronted this question,[44] because post-*Counselman* immunity statutes reaching the Court either have followed the pattern of the 1893 Act in providing transactional immunity,[45] or have been found deficient for

[43] At this point the Court added the following note: "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U. S., at 79 n. 18. If transactional immunity had been deemed to be the "constitutional rule" there could be no federal prosecution.

[44] See, *e. g.*, *California* v. *Byers*, 402 U. S. 424, 442 n. 3 (1971) (Harlan, J., concurring), *United States* v. *Freed*, 401 U. S. 601, 606 n. 11 (1971); *Piccirillo* v. *New York*, 400 U. S. 548 (1971); *Stevens* v. *Marks*, 383 U. S. 234, 244–245 (1966).

[45] *E. g.*, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *Ullmann* v. *United States*, 350 U. S. 422 (1956); *Smith* v. *United States*, 337 U. S. 137 (1949); *United States* v. *Monia*, 317 U. S. 424

failure to prohibit the use of all evidence derived from compelled testimony.[46] But both the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. Since the privilege is fully applicable and its scope is the same whether invoked in a state or in a federal jurisdiction,[47] the *Murphy* conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with the scope of the privilege. As the *Murphy* Court noted, immunity from use and derivative use "leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege" [48] in the absence of a grant of immunity. The *Murphy* Court was concerned solely with the danger of incrimination under federal law, and held that immunity from use and derivative use was sufficient to displace the danger. This protection coextensive with the privilege is the degree of protection which the Constitution requires, and

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(1943); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Jack* v. *Kansas*, 199 U. S. 372 (1905); *Brown* v. *Walker*, 161 U. S. 591 (1896). See also n. 35, *supra*.

[46] *E. g., Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, 80 (1965); *Arndstein* v. *McCarthy*, 254 U. S. 71, 73 (1920).

[47] In *Malloy* v. *Hogan*, 378 U. S. 1, 10–11 (1964), the Court held that the same standards would determine the extent or scope of the privilege in state and in federal proceedings because the same substantive guarantee of the Bill of Rights is involved. The *Murphy* Court emphasized that the scope of the privilege is the same in state and in federal proceedings. *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79 (1964).

[48] *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79 (1964).

is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.[49]

IV

Although an analysis of prior decisions and the purpose of the Fifth Amendment privilege indicates that use and derivative use immunity is coextensive with the privilege, we must consider additional arguments advanced by petitioners against the sufficiency of such immunity. We start from the premise, repeatedly affirmed by this Court, that an appropriately broad immunity grant is compatible with the Constitution.

Petitioners argue that use and derivative use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available which might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.

This argument presupposes that the statute's prohibition will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom:

> "no testimony or other information compelled under the order (or any information directly or

[49] As the Court noted in *Gardner* v. *Broderick*, 392 U. S. 273, 276 (1968), "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

> indirectly derived from such testimony or other information) may be used against the witness in any criminal case. . . ." 18 U. S. C. § 6002.

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," [50] and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

A person accorded this immunity under 18 U. S. C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy:*

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U. S., at 79 n. 18.

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

This is very substantial protection,[51] commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked

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[50] See, *e. g., Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70, 80 (1965).

[51] See *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 102–104 (1964) (WHITE, J., concurring).

a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.

The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions.[52] A coerced confession, as revealing of leads as testimony given in exchange for immunity,[53] is inadmissible in a criminal trial, but it does not bar prosecution.[54] Moreover, a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced confession claim. One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.[55] On the other hand, a defendant raising a coerced confession claim under the Fifth Amendment must first prevail in a voluntariness

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[52] *Adams* v. *Maryland*, 347 U. S. 179, 181 (1954); *Bram* v. *United States*, 168 U. S. 532, 542 (1897).

[53] As MR. JUSTICE WHITE, concurring in *Murphy*, pointed out:

"A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. *Malloy* v. *Hogan*, [378 U. S. 1, 7–8]; *Spano* v. *New York*, 360 U. S. 315; *Bram* v. *United States*, 168 U. S. 532." 378 U. S., at 103.

[54] *Jackson* v. *Denno*, 378 U. S. 368 (1964).

[55] See p. 20, *supra;* Brief for Respondent, at 37; Cf. *Chapman* v. *California*, 386 U. S. 18 (1967).

hearing before his confession and evidence derived from it become inadmissible.[56]

There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where, acting pursuant to statute and accompanying safeguards, testimony is compelled in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.

We conclude that the immunity provided by 18 U. S. C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. The judgment of the Court of Appeals for the Ninth Circuit accordingly is

Affirmed.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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[56] *Jackson* v. *Denno*, 378 U. S. 368 (1964).

SUPREME COURT OF THE UNITED STATES

No. 70–117

Charles Joseph Kastigar and Michael Gorean Stewart, Petitioners, *v.* United States.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 22, 1972]

MR. JUSTICE DOUGLAS, dissenting.

The Self-Incrimination Clause says "No person . . . shall be compelled in any criminal case to be a witness against himself." I see no answer to the proposition that he is such a witness when only "use" immunity is granted.

My views on the question of the scope of immunity that is necessary to force a witness to give up his guarantee against self-incrimination contained in the Fifth Amendment are so well known, see *Ullmann* v. *United States*, 350 U. S. 422, 440 (dissenting), and *Piccirillo* v. *New York*, 400 U. S. 548, 549 (dissenting), that I need not write at length.

In *Counselman* v. *Hitchcock*, 142 U. S. 547, 586, the Court adopted the transactional immunity test: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.*, at 586. In *Brown* v. *Walker*, 161 U. S. 591, a case involving another federal prosecution, the immunity statute provided that the witness would be protected "on account of any transaction . . . concerning which he may testify." *Id.*, at 594. The Court held that the immunity offered was coterminous with the privilege and that the witness could therefore be compelled to

testify, a ruling that made "transactional immunity" part of the fabric of our constitutional law. *Ullmann* v. *United States, supra,* at 436.

This Court, however, apparently believes that *Counselman* and its progeny were overruled, *sub silentio,* in *Murphy* v. *Waterfront Commission,* 378 U. S. 52. *Murphy* involved state witnesses, granted transactional immunity under state law, who refused to testify for fear of subsequent federal prosecution. We held that the testimony in question could be compelled, but that the Federal Government would be barred from using any of the testimony, or its fruits, in a subsequent federal prosecution.

Murphy overruled, not *Counselman,* but *Feldman* v. *United States,* 322 U. S. 487, which had held "that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." *Murphy* v. *Waterfront Commission, supra,* at 77. But *Counselman,* as the *Murphy* Court recognized, "said nothing about the problem of incrimination under the law of another sovereign." *Id.,* at 72. That problem is one of federalism, as to require transactional immunity between jurisdictions might

> "deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity [a result which] would be gravely in derogation of its sovereignty and obstructive of its administration of justice." *Catena* v. *Elias,* 449 F. 2d 40, 44 (CA3 1971).

Moreover, as MR. JUSTICE BRENNAN has pointed out, the threat of future prosecution

> "substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the

prosecution differs from the jurisdiction that compelled the testimony. Concern over informal and undetected exchange of information is also correspondingly less when two different jurisdictions are involved." *Piccirillo* v. *New York, supra,* at 568.

None of these factors apply when the threat of prosecution is from the jurisdiction seeking to compel the testimony, which is the situation we faced in *Counselman,* and which we face today. The irrelevance of *Murphy* to such a situation was made clear in *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70, in which the Court struck down an immunity statute because it failed to measure up to the standards set forth in *Counselman.* Inasmuch as no interjurisdictional problems presented themselves, *Murphy* was not even cited. That is further proof that *Murphy* was not thought significantly to undercut *Counselman.*[1] See *Stevens* v. *Marks,* 383 U. S. 234, 244–245, 249–250; Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination

[1] In *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70, the Court was faced with a Fifth Amendment challenge to the communist registration provision of the Subversive Activities Control Act of 1950. We held that the provision violated the prospective registrant's privilege against self-incrimination, and that the registration provision was not saved by a so-called "immunity statute" (§ 4 (f)) which prohibited the introduction into evidence in any criminal prosecution of the fact of registration under the Act. The Court's analysis of this immunity provision rested solely on *Counselman:*

"In *Counselman* v. *Hitchcock,* 142 U. S. 547, decided in 1892, the Court held 'that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . . ,' and that such a statute is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard . . .' by affording 'absolute immunity against future prosecution for the offence to which the question relates.' Id., at 585–586. *Measured by these standards,*

and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 164 (1966).

If, as some have thought, the Bill of Rights contained only "counsels of moderation" from which courts and legislatures could deviate according to their conscience or discretion, then today's contraction of the Self-Incrimination Clause of the Fifth Amendment would be understandable. But that has not been true, starting with Chief Justice Marshall's opinion in *United States* v. *Burr*, 25 F. Cas. 38 (No. 14692e), where he ruled that the reach of the Fifth Amendment was so broad as to make the privilege applicable when there was a mere possibility of a criminal charge being made.

The Court said in *Hale* v. *Henkel*, 201 U. S. 43, 67, that "if the criminality has already been taken away, the Amendment ceases to apply." In other words, the immunity granted is adequate if it operates as a complete pardon for the offense. *Brown* v. *Walker*, *supra*, at 595. That is the true measure of the Self-Incrimination Clause. As MR. JUSTICE BRENNAN has stated: ". . . use immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality." *Piccirillo* v. *New York*, *supra*, at 567 (dissenting).

As MR. JUSTICE BRENNAN has also said:

> "Transactional immunity . . . provides the individual with an assurance that he is not testifying about matters for which he may later be prosecuted. No question arises of tracing the use or nonuse of

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the immunity granted by § 4 (f) is not complete." 382 U. S., at 80. (Emphasis added.)

Thus, the *Albertson* Court, which could have struck the statute by employing the test approved today, went well beyond, and measured the statute solely against the more restrictive standards of *Counselman*.

information gleaned from the witness' compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony. Both witness and government know precisely where they stand. Respect for law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony." 400 U. S., at 568–569.

When we allow the prosecution to offer only "use" immunity we allow it to grant far less than it has taken away. For while the precise testimony that is compelled may not be used, leads from that testimony may be pursued and used to convict the witness.[2] My view is that the Framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The Self-Incrimination Clause creates, as I have said before, "the federally protected right of silence," making it unconstitutional to use a law "to pry open one's lips and make him a witness against himself." *Ullmann* v. *United States,* 350 U. S., at 446. That is indeed one of the chief procedural guarantees in our accusatorial system. Government acts in an ignoble way when it stoops to the end which we authorize today.

I would adhere to *Counselman* v. *Hitchcock* and hold that this attempt to dilute the Self-Incrimination Clause is unconstitutional.

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[2] As MR. JUSTICE MARSHALL points out, *post,* it is futile to expect that a ban on use or derivative use of compelled testimony can be enforced.

It is also possible that use immunity might actually have an adverse impact on the administration of justice rather than promote law enforcement. A witness might believe, with good reason, that his "immunized" testimony will inevitably lead to a felony conviction. Under such circumstances, rather than testify and aid the investigation, the witness might decide he would be better off remaining silent even if he is jailed for contempt.

SUPREME COURT OF THE UNITED STATES

No. 70–117

Charles Joseph Kastigar and Michael Gorean Stewart, Petitioners, *v.* United States.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May 22, 1972]

MR. JUSTICE MARSHALL, dissenting.

Today the Court holds that the United States may compel a witness to give incriminating testimony, and subsequently prosecute him for crimes to which that testimony relates. I cannot believe the Fifth Amendment permits that result. See *Piccirillo* v. *New York*, 400 U. S. 548, 552 (1971) (BRENNAN, J., dissenting from dismissal of certiorari).

The Fifth Amendment gives a witness an absolute right to resist interrogation, if the testimony sought would tend to incriminate him. A grant of immunity may strip the witness of the right to refuse to testify, but only if it is broad enough to eliminate all possibility that the testimony will in fact operate to incriminate him. It must put him in precisely the same position, *vis-à-vis* the government that has compelled his testimony,* as he would have been in had he remained silent in reliance on the privilege. *Ullmann* v. *United States*, 350 U. S. 422 (1956); *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Brown*

*This case does not, of course, involve the special considerations that come into play when the prosecuting government is different from the government that has compelled the testimony. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964).

v. *Walker*, 161 U. S. 591 (1896); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892).

The Court recognizes that an immunity statute must be tested by that standard, that the relevant inquiry is whether it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Ante*, at 22. I assume, moreover, that in theory that test would be met by a complete ban on the use of the compelled testimony, including all derivative use, however remote and indirect. But I cannot agree that a ban on use will in practice be total, if it remains open for the Government to convict the witness on the basis of evidence derived from a legitimate independent source. The Court asserts that the witness is adequately protected by a rule imposing on the Government a heavy burden of proof if it would establish the independent character of evidence to be used against the witness. But in light of the inevitable uncertainties of the fact-finding process, see *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958), a greater margin of protection is required in order to provide a reliable guarantee that the witness is in exactly the same position as if he had not testified. That margin can be provided only by immunity from prosecution for the offenses to which the testimony relates, *i. e.*, transactional immunity.

I do not see how it can suffice merely to put the burden of proof on the Government. First, contrary to the Court's assertion, the Court's rule does leave the witness "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Ante*, at 20. For the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution.

A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the Government, the Government will have no difficulty in meeting its burden by mere assertion if the witness produces no contr - evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. Cf. *Giglio* v. *United States*, — U. S. — (1972); *Santobello* v. *New York*, 404 U. S. 257 (1971). The Court today sets out a loose net to trap tainted evidence and prevent its use against the witness, but it accepts an intolerably great risk that tainted evidence will in fact slip through that net.

In my view the Court turns reason on its head when it compares a statutory grant of immunity to the "immunity" that is inadvertently conferred by an unconstitutional interrogation. The exclusionary rule of evidence that applies in that situation has nothing whatever to do with this case. Evidence obtained through a coercive interrogation, like evidence obtained through an illegal search, is excluded at trial because the Constitution prohibits such methods of gathering evidence. The exclusionary rules provide a partial and inadequate remedy to some victims of illegal police conduct, and a similarly partial and inadequate deterrent to police officers. An immunity statute, on the other hand, is much more ambitious than any exclu-

sionary rule. It does not merely attempt to provide a remedy for past police misconduct, which never should have occurred. An immunity statute operates in advance of the event, and it authorizes—even encourages—interrogation which would otherwise be prohibited by the Fifth Amendment. An immunity statute thus differs from an exclusionary rule of evidence in at least two critical respects.

First, because an immunity statute gives constitutional approval to the resulting interrogation, the Government is under an obligation here to remove the danger of incrimination completely and absolutely, whereas in the case of the exclusionary rules it may be sufficient to shield the witness from the fruits of the illegal search or interrogation in a partial and reasonably adequate manner. For when illegal police conduct has occurred, the exclusion of evidence does not purport to purge the conduct of its unconstitutional character. The constitutional violation remains, and may provide the basis for other relief, such as a damage action (see 42 U. S. C. § 1983 and *Bivens* v. *Six Agents,* 403 U. S. 388 (1971)), or a criminal prosecution of the responsible officers (see 18 U. S. C. §§ 241–242). The Constitution does not authorize police officers to coerce confessions or to invade privacy without cause, so long as no use is made of the evidence they obtain. But this Court has held that the Constitution does authorize the Government to compel a witness to give potentially incriminating testimony, so long as no incriminating use is made of the resulting evidence. Before the Government puts its seal of approval on such an interrogation, it must provide an absolutely reliable guarantee that it will not use the testimony in any way at all in aid of prosecution of the witness. The only way to provide that guarantee is to give the witness immunity from prosecution for crimes to which his testimony relates.

Second, because an immunity statute operates in advance of the interrogation, there is room to require a broad grant of transactional immunity without imperiling large numbers of otherwise valid convictions. An exclusionary rule comes into play after the interrogation or search has occurred; and the decision to question or to search is often made in haste, under pressure, by an officer who is not a lawyer. If an unconstitutional interrogation or search were held to create transactional immunity, that might well be regarded as an excessively high price to pay for the "constable's blunder." An immunity statute, on the other hand, creates a framework in which the prosecuting attorney can make a calm and reasoned decision whether to compel testimony and suffer the resulting ban on prosecution, or to forgo the testimony.

For both these reasons it is clear to me that an immunity statute must be tested by a standard far more demanding than that appropriate for an exclusionary rule fashioned to deal with past constitutional violations. Measured by that standard, the statute approved today by the Court fails miserably. I respectfully dissent.